SHDKT PROCEEDINGS AND ORDERS DATE: [03/13/91]

CASE NBR: [90100096] CFX STATUS: [GRANTED]
SHORT TITLE: [Siegert, Frederick]
VERSUS [Gilley, H. Melvyn] DATE DOCKETED: [071390]
PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Jul 13 1990	G	Petition for writ of certiorari filed.
4	Aug 9 1990		Order extending time to file response to petition until September 17, 1990.
5	Aug 9 1990		The above extension of time is for the United States.
6	Sep 12 1990		Brief of respondent H.Melvin Gilley in opposition filed.
7	Sep 19 1990		DISTRIBUTED. October 5, 1990
9	Oct 9 1990		REDISTRIBUTED. October 12, 1990
10	Oct 15 1990		Petition GRANTED.
11	Oct 26 1990	D	Motion of petitioner to proceed further herein in forma pauperis filed.
12	Oct 29 1990		DISTRIBUTED. Nov. 2, 1990. (Motion of petitioner for leave to proceed further herein in forma pauperis).
13	Nov 5 1990		Motion of petitioner to proceed further herein in forma pauperis DENIED.

Last page of docket

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	DATE	NOTE	PROCEEDINGS & ORDERS
14	Nov 26 1990		Record filed. Certified copy of original record and proceedings received.
15	Nov 29 1990		Brief amici curiae of ACLU, et al. filed.
16	Nov 29 1990		Joint appendix filed.
17	Nov 29 1990		Brief of petitioner Siegert filed.
18	Dec 17 1990		SET FOR ARGUMENT TUESDAY, FEBRUARY 19, 1991. (1ST CASE)
19	Dec 28 1990		Brief of respondent filed.
20	Jan 10 1991		CIRCULATED.
21	Jan 28 1991	X	Reply brief of petitioner Siegert filed.
22	Feb 19 1991		ARGUED.

90-96

Supreme Court, U.S.
FILED
JUL 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court Of The United States

October Term, 1990

FREDERICK A. SIEGERT,

Petitioner

v.

H. MELVYN GILLEY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Nina Kraut
3815 Yuma Street, NW
Washington, D.C. 20016
202/745-0300
Counsel of Record

July 13, 1990

Questions Presented

1. In a claim for damages under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), in which malice has been alleged and where qualified immunity has been raised as a defense, whether a "heightened pleading" standard which precludes limited discovery prior to disposition on a summary judgment motion violates applicable law?

2. In a *Bivens* claim for damages, whether a federal official can be qualifiedly immune from suit without regard to whether the challenged conduct was discretionary in nature?

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No. _____

In The

Supreme Court Of The United States

October Term, 1990

FREDERICK A. SIEGERT,

Petitioner

v.

H. MELVYN GILLEY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Frederick A. Siegert, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals entered in the above-entitled proceeding on February 9, 1990.

OPINIONS BELOW

The April 16, 1990 Order of the United States Court of Appeals for the District of Columbia Circuit, denying *en banc* review, with a concurring opinion (Wald, C.J.), and that court's April 16, 1990 Order denying rehearing, with a dissenting statement (Wald, C.J.), are unreported and are reprinted in the appendix hereto at, respectively, 2a, 3a and 4a. The February 9, 1990 Opinion and

Order of the court below, reversing the trial court's denial of respondent's summary judgment motion, is reported at 895 F.2d 797 (D.C. Cir. 1990), and is reprinted in the appendix hereto at 5a-25a. That court's January 9, 1990 judgment denying petitioner's motion to dismiss the appeal is unreported and is reprinted in the appendix hereto at 26a. The June 30, 1990 opinion and order of the trial court denying respondent's motion for reconsideration of the denial of his motion to dismiss or in the alternative for summary judgment is reported at 692 F. Supp. 1408 (D.D.C. 1988) and is reprinted in the appendix hereto at 27a-52a. The trial court's December 3, 1987 opinion and order denying respondent's motion to dismiss or in the alternative for summary judgment is unreported and is reprinted in the appendix hereto at 53a-54a.

JURISDICTION

In response to petitioner's complaint for damages and injunctive relief, respondent filed a motion to dismiss or in the alternative for summary judgment in which the defense of qualified immunity was raised. On December 3, 1987 the United States District Court (Sporkin, J.) conditionally denied the motion pending limited discovery. 53a-54a. Respondent sought reconsideration of that decision and on June 30, 1988, the trial court denied the motion and ordered that the limited discovery it had previously ordered be conducted. 27a-52a. On January 9, 1989 the United States Court of Appeals for the District of Columbia Circuit denied petitioner's motion to dismiss respondent's appeal, 26a, and on February 9, 1990 that court reversed the trial court's denial of respondent's motion to reconsider, vacated its discovery order and remanded the case with instructions that it be dismissed. 5a-25a. A final order denying a petition for rehearing or suggestion for rehearing *en banc* was entered on April 16, 1990. 2a-4a.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the District of Columbia Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOKED

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. §331. Judicial Conference of the United States:

> The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate. He shall preside at such conference which shall be known as the Judicial Conference of the United States. Special sessions of the Conference may be called by the Chief Justice at such times and places as he may designate.
>
> The district judge to be summoned from each judicial circuit shall be chosen by the circuit and district judges of the circuit at the annual judicial conference of the circuit held pursuant to section 333 of this title and shall serve as a member of the conference for three successive years, except that in the year following the enactment of this amended section the judges in the first, fourth, seventh, and tenth circuits shall choose a district judge to serve for one year, the judges in the second, fifth, and eighth circuits shall choose a district

judge to serve for two years and the judges in the third, sixth, ninth, and District of Columbia circuits shall choose a district judge to serve for three years.

If the chief judge of any circuit, the chief judge of the Court of International Trade, or the district judge chosen by the judges of the circuit is unable to attend, the Chief Justice may summon any other circuit or district judge from such circuit or any other judge of the Court of International Trade, as the case may be. Every judge summoned shall attend and, unless excused by the Chief Justice shall remain throughout the sessions of the conference and advise as to the needs of his circuit or court and as to any matters in respect of which the administration of justice in the courts of the United States may be improved.

The Conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary. It shall also submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business. The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee. The Conference or the standing committee may hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and make necessary and appropriate orders in the exercise of its authority. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the Supreme Court or by the clerk of any court of appeals, at the direction of the Chief Justice or his designee and under the seal of the court and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and

subpoenas duces tecum issued on behalf of the United States or an officer or any agency thereof. The Conference may also prescribe and modify rules for the exercise of the authority provided in section 372(c) of this title. All judicial officers and employees of the United States shall promptly carry into effect all orders of the Judicial Conference or the standing committee established pursuant to this section.

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

The Judicial Conference shall review rules prescribed under section 2071 of this title by the courts, other than the Supreme Court and the district courts, for consistency with Federal law. The Judicial Conference may modify or abrogate any such rule so reviewed found inconsistent in the course of such a review.

The Attorney General shall, upon request of the Chief Justice, report to such Conference on matters relating to the business of the several courts of the United States, with particular reference to cases to which the United States is a party.

The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

Rule 8, Federal Rules of Civil Procedure. General Rules of Pleading:

(a) Claims For Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and

satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure To Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of the consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Rule 9, Federal Rules of Civil Procedure. Pleading Special Matters:

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act: In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasijudicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C. §1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

STATEMENT OF THE CASE

Petitioner, an experienced clinical psychologist,[1] began his employment at St. Elizabeths Hospital ("St. E's") in Washington, D.C. in November 1979 where he worked with severely retarded children, to a more limited degree with severely retarded adults, and with members of their families. During most of his employment there he was the Behavior Therapy Coordinator for the division of the hospital in which he worked, and for all of his employment there he had received exemplary "job performance"

---

[1] Prior to his employment at St. Elizabeths, petitioner, who has a Ph.D in clinical psychology, had worked for several years at the District of Columbia's Forest Haven School for the Mentally Retarded and at other similar public institutions.

ratings. For example, from January 1984 through December 1984 his "job performance" rating was "outstanding."

Respondent, a clinical psychologist who lacked any significant practical experience and theoretical training in behavior modification therapy for the mentally retarded, became the division's supervisory psychologist in January 1985. His immediate attempts to change some aspects of the behavior modification program that had been used for many years by petitioner and other professionals in the division were strongly resisted since the proposed changes were inappropriate for and would be ineffective in the treatment of these profoundly retarded individuals. The tension and animosity between petitioner and respondent was exacerbated by petitioner's absence from work for a considerable period in 1985 due to a head injury he had sustained as a result of working with a patient earlier in that year. Respondent thought petitioner was "AWOL."[2]

In the Spring of 1985 petitioner began to look for a new job, in large part due to respondent's attitude and actions which were interfering with petitioner's ability to work effectively with his patients. In May 1985 the Department of the Army informed petitioner that he would be considered for vacancies in European posts as a clinical psychologist, and in August 1985 petitioner signed a 36-month contract with the Army to work in their Exceptional Family Member Program in Bremerhaven, West Germany.

In late August or early September 1985, and notwithstanding his exemplary "job performance" ratings, petitioner was notified that a "letter of removal" would not be placed in his personnel file on condition that he resign his position forthwith. It was petitioner's belief that the proposed removal grew directly out of his conflict with respondent and with the related, and as of then, still mixed-up medical leave/AWOL situation. Petitioner informed St. E's that he would be resigning in any event since he had signed or was about to sign a contract with the Army, and on October 1,

[2] Although St. E's records initially noted that petitioner was "absent without leave" during that period, the Workman's Compensation Board of the Department of Labor has fully compensated petitioner for what actually was compensable medical leave time.

1985 petitioner resigned from St. E's. He began his employment with the Army in Bremerhaven shortly thereafter.

Becoming "credentialed"[3] both as to his working with children and, separately, as to his working with adults was a condition of employment with the Army, as it had been when petitioner worked at St. E's. Consequently, and shortly after his arrival in Bremerhaven, petitioner filled out and signed an Army-regulation "Credential Information Request Form." 55a. Among other things, it contained a form letter which asked for "all information on job performance and the privileges granted while I was a member of your staff...." *Id.* On or about October 15, 1985, the Credential Information Request Form was sent to St. E's where it was apparently channeled to Eugene C. Stammeyer, Director of Psychology there, who, in turn, and unbeknownst to petitioner, forwarded the Army's standardized form to petitioner's last supervisor at St. E's, that is, to respondent. Rather than giving the Army any of the standardized data it had requested, however, all of which was in petitioner's personnel file there, respondent spontaneously wrote a letter to Lt. Col. William R. Smith, Jr., Deputy Commander for Clinical Services at Bremerhaven, chairperson of the credentials committee and petitioner's immediate supervisor.[4] In that unsolicited October 23, 1985 letter, respondent maliciously and falsely stated that petitioner was "inept, unethical [and] perhaps the least trustworthy individual [he had] supervised in...thirteen years at" St. E's. 35a.

As a direct result of respondent's letter, Col. Smith notified petitioner that reports about him were "extremely unfavorable." Therefore, petitioner was informed, the hospital's credentialing committee would not recommend the granting of privileges needed in order for him to work at the hospital. *Id.*

[3] "Credentialing" is synonymous with "privileges" which are granted by a hospital's own medical staff or board. For example, if a person wants to practice a particular specialty in a hospital, he or she must be granted particular privileges in conformity with that specialty's standards or criteria for practice which have been established by the hospital's board, such as educational standards, years of practice, type and quality of supervision, and so on. 34a.

[4] The trial court stated that Col. Smith "contacted" and "spoke with" respondent prior to October 23, 1985. 34a. Petitioner alleged no such thing and knows of nothing in the public record which reflects that that occurred.

For the following several months, while petitioner was appealing the provisional denial of becoming credentialed, he was alternately allowed to practice his specialty for a time and then, alternately, he was not, and for many months during the credential review process, petitioner was relegated to working in the medical library at the Bremerhaven hospital. 8a.

In July 1986, in an effort to practice his specialty while he was trying to gain his credentials, petitioner applied for and was hired as a clinical psychologist at the Army's hospital in Stuttgart. On the day he reported for work, however, he was turned away because of the negative things personnel there had heard about him from the Army hospital in Bremerhaven. 8a; 35a. Petitioner returned to Bremerhaven and ultimately failed in his efforts to obtain his credentials. As a result, he resigned his position since, without the credentials, he was unable to practice as a clinical psychologist in the area of his specialty or in any other comparable area. *Id.*

On November 25, 1986 petitioner filed a complaint against respondent for damages[5] in the United States District Court for the District of Columbia. He alleged that by maliciously writing the October 23, 1985 letter, respondent had violated petitioner's rights guaranteed by the due process clause of the Fifth Amendment as interpreted under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) in that respondent's act severely and irreparably damaged both petitioner's reputation and his ability to earn a living as a governmental clinical psychologist.[6]

On February 5, 1987 respondent filed a motion to dismiss the complaint, or alternatively for summary judgment. Citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and among other things, he claimed he was qualifiedly immune from suit since his conduct did not violate clearly established law of which a reasonable person would have known. Accordingly, he urged dismissal or summary judgment since there was no clearly established constitutional

[5] In an amended complaint petitioner additionally requested injunctive relief.

[6] Petitioner also alleged several pendent claims, including defamation, intentional infliction of emotional distress, interference with contractual relations and interference with prospective advantage.

prohibition against furnishing a "reference" about a former employee for a new employer.[7] The motion was supported not by an affidavit from respondent, who theoretically could have stated that the letter was written in good faith, but rather by one from Dr. Stammeyer who mischaracterized the Army's Credential Information Request Form as a "request for a reference."[8]

On December 3, 1987, the trial court stated that it was not "prepared to decide this matter on a Summary Judgment motion at this time," 54a, that it needed to "see a more developed record," *id.*, and "limited discovery" was therefore ordered. *Id.*[9]

On December 15, 1987 respondent filed a motion seeking reconsideration of the court's December 3, 1987 decision together with a request that discovery be stayed pending resolution of that motion. He argued that under *Harlow*, *supra*, and *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the court was compelled to resolve the summary judgment motion prior to ordering discovery. Respondent claimed that there were no material facts in dispute,[10] and that since petitioner had not conformed his opposition to Rule 56(f), F. R. Civ. Proc., respondent's motion could be resolved without discovery because it had raised only legal issues.[11]

[7] As further grounds for dismissal, respondent argued that a state's common law, and not the due process clause, protected reputation and the right to exploit it for commercial gain, that the letter was not published incident to petitioner's removal from his job, and that, in any event, petitioner consented to the letter of "reference" which was sent by respondent to Lt. Col. Smith.

[8] In opposition to the motion, petitioner argued that responding to a Credential Information Request Form was not a discretionary act but rather was a "ministerial" task, that is, an act which required the "execution of a policy as distinct from its formulation." *Briscoe v. Arlington County*, 738 F.2d 1352 (D.C.Cir. 1984). See also, *Harlow*, *supra*, at 816.

[9] The court found it appropriate for the parties to take each other's depositions, for the deposition of Col. Smith to be taken, and for correspondence between Col. Smith and respondent to be produced. 54a.

[10] Contrary to respondent's claim, in a statement of material facts in issue filed under a local court rule, and in addition to other disputed facts, petitioner stated that respondent had performed a ministerial, that is, a "non-policy-making," task.

[11] Petitioner opposed the motion on grounds that prior to ruling on the summary judgment motion, the court ought to be able to first determine whether there

On June 30, 1988 the trial court denied respondent's request for reconsideration. 27a-52a. Among other things, the court observed that respondent had refused to accept as true petitioner's allegations, 32a, and had "sharply slanted" the characterization of what had been requested by the Army. *Id.* Moreover, and as to whether respondent had violated a clearly established right, the trial court suggested that respondent's actions may have constituted the utterance of a false statement under 18 U.S.C. §1001. 48a. In any event, and in light of the lack of assertions to contradict petitioner's allegations,[12] it appears that the only material facts which the court considered to be in dispute were the "truth or falsity of [respondent's] letter," 34a-35a, and what the content was of discussions the court believed[13] took place between Lt. Col. Smith and respondent. 34a.

With its factual analysis complete, with at least a suggestion that respondent had engaged in a ministerial or a discretionary act, see, *supra*, and under *Harlow* and its progeny,[14] the trial court determined that the threshold question that had to be addressed was whether it was clearly established in late 1985 that petitioner's loss of employment at Bremerhaven and his inability to obtain his credentials as a result of respondent's communications involved the "violation of a concrete, specific 'liberty interest' within the protection of the due process clause of the Fifth Amendment." 39a. The court found both that it was, 39a-46a, and that a reasonable person would have known that it was in late 1985. 46a; 49a. Moreover, the court found that petitioner's allegations, which had been subjected to the "heightened pleading" standard of the circuit,[15] were "well pleaded...[and] were accepted as true." 52a. The court therefore denied respondent's motion and ordered the previously-ordered discovery to proceed. *Id.*

were any material facts in dispute, such as whether the Credential Information Request Form was a request for a letter of reference or simply a request for an objective response as to what petitioner's credentials and job performance ratings had been. In denying the motion, the trial court resolved this question by accepting petitioner's construction of what the Form meant.

[12] The court determined that Dr. Stammeyer's affidavit was largely devoted to an explanation of the process whereby St. E's was asked to respond to the standardized credentialing form.

[13] See, *supra*, at n. 4.

[14] See, e.g., *Anderson v. Creighton*, 483 U.S. 635 (1987); *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

On February 9, 1990 the decision of the trial court was reversed.[16] 5a-25a. In *dicta*, the court below found that the objective, reasonable person standard under *Harlow* had "purged qualified immunity of its subjective components,"[17] and had "rejected inquiry into state of mind...."[18] 12a. Nevertheless, finding that neither *Harlow*, *Mitchell* nor *Davis* made it clear that inquiry into subjective motivation was actually precluded under qualified immunity analysis, the court below determined that petitioner had to be given "the opportunity to prove such allegations of unconstitutional motive." *Id.*[19] Thus, while in one breath giving this opportunity to petitioner, in the next it took it away by concluding that in claims where unconstitutional motive is advanced, "if a plaintiff fails to allege direct evidence of unconstitutional intent, his claim must be dismissed immediately," without the opportunity to conduct any discovery such as that which had been ordered by the trial court. 12a.

In its analysis under *Harlow* and pursuant to the circuit's heightened pleading standard, the court first determined that the trial court failed to adequately particularize the right at issue. 16a. Contrary to law, 32a, the court below adopted respondent's view that the Army had requested him to respond to a broad-ranging "report" or

[15] See, e.g., *Hobson v. Wilson*, 737 F.2d 1 (D.C.Cir. 1984); *Smith v. Nixon*, 807 F.2d 197 (D.C. Cir. 1986).

[16] On January 9, 1989 the court below denied petitioner's motion to dismiss the appeal. 26a.

[17] *Mitchell v. Forsyth*, *supra*, at 517.

[18] *Davis v. Scherer*, 468 U.S. 183, 191 (1984).

[19] The court below failed to make the threshold determination, under *Westfall v. Erwin*, ___U.S.___, 98 L.Ed.2d 619 (1988), decided a year prior to consideration of this case, as to whether what respondent was requested to do was a discretionary or a ministerial task if, indeed, he was requested to do anything at all. The court conceded that there was "some dispute as to whether the evaluation sought here was 'subjective' or 'objective,'" 16a, but it decided that this inquiry was irrelevant, *id.*, under the *Harlow* standard. See, *infra*.

"evaluation" about an employee, 16a, unlike the voluntarily written defamatory letters at issue in *Doe*[20] and *Bartel*.[21] Thus, the court reasoned, under the circumstances of this case, the law was not clearly established, within the meaning of *Harlow*, that respondent had violated petitioner's due process rights.

Notwithstanding that view, the court "assumed without deciding," 16a- 17a, that petitioner's *Bivens* claim could survive respondent's motion if his pleadings comported with the circuit's heightened pleading requirement as to unconstitutional motive. *Id.* According to the court, however, petitioner's allegation of malice was "unsupported by any evidence beyond innuendo." 17a. Limited discovery that might be permitted under *Anderson*, and that had been permitted in *Martin v. D.C. Metro. Police Dept.*, 812 F.2d 1425 (D.C.Cir. 1987), was inappropriate here. In the court's view, *Anderson* permitted discovery only to "establish the factual basis for determining the objective reasonableness of... [a defendant's] acts." 18a. In contrast, the court found that the district court's limited discovery order was for the impermissible purpose of inquiring into motive. *Id.* And as to *Martin*, the court claimed that it had allowed limited discovery after remand there "only as a 'one-time exception' because of the special exigencies in that case." *Id.* Accordingly, the court reversed the trial court's denial of respondent's motion for reconsideration, vacated its discovery order and remanded the case with the directive that the case be dismissed. 19a.

As to the majority's endorsement of the "heightened pleading" rule, the dissent (Wald, C.J.), 19a-25a, zeroed in on the:

> "dilemma created by our circuit's current jurisprudence on qualified immunity: plaintiffs are required to adhere to a 'heightened pleading standard' of nonconclusory facts that demonstrate a government official's unconstitutional motive, but they are entirely restricted from obtaining through discovery the information necessary to make that showing."

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[20] *Doe v. United States Dept. of Justice*, 753 F.2d 1092 (D.C.Cir. 1985).

[21] *Bartel v. F.A.A.*, 725 F.2d 1403 (D.C.Cir. 1984).

19a. The standard, it was stated, reflected a "misguided approach to our 'twin goals' of 'limit[ing] the litigation burdens placed on government officials by insubstantial lawsuits' and 'preserving the opportunity for plaintiffs to vindicate constitutional rights.'" 20a. The dissent went on to state that instead of "slam[ming] shut this window for discovery through...[an] unyielding application of the heightened pleading standard," 24a, that is, when "proof of the defendant's motive is peculiarly in the defendant's hands," 20a, limited discovery ought to be permitted in order to "preserve a plaintiff's constitutional rights," 21a, while simultaneously "enabling Government officials to avoid the rigors of 'protracted' discovery." *Id.*

Under the circumstances of this case, the dissent found that although the trial court correctly determined that it was clearly established in late 1985 that petitioner had a right to a "good faith evaluation," 24a, the lower court failed to determine whether petitioner's allegations of malice had met the heightened pleading standard. *Id.* Accordingly, vacation of the denial of the qualified immunity defense was mandated. *Id.* Importantly, however, it was also found that petitioner's pleadings contained "some evidentiary basis," *id*, to support his allegations of malice, and that limited discovery was therefore warranted in order to fairly resolve the qualified immunity issue. *Id.*

On April 16, 1990 petitioner's petition for rehearing and suggestion for rehearing *en banc* were denied. 2a-4a. Chief Judge Wald would have granted rehearing. 4a. She agreed, however, that at that time, rehearing the case *en banc* "would not alleviate the problem" created by the circuit's "heightened pleading standard," even though the issue, "which raise[d] serious questions of fairness and justification under existing Supreme Court precedent," was one of "exceptional importance" within the meaning of Rule 35(a), Fed. R. App. Proc. 3a.

REASONS FOR GRANTING THE WRIT

I. The Court Below Has Decided An Important Question Of Federal Law Which Has Not Been But Should Be Settled By This Court, Which Conflicts With Applicable Decisions Of This Court, And Which Conflicts With Certain Federal Rules Of Civil Procedure.

A. This Court Has Not Ruled On The Lower Court's "Heightened Pleading" Standard Which Conflicts With *Harlow*, *Mitchell* and *Anderson*.

In recent[22] *Bivens* claims in which malice has been alleged, the court below has required plaintiffs to advance, in most cases prior to discovery,[23] "specific, discernible facts or offers of proof that would constitute direct as opposed to merely circumstantial evidence of the [unconstitutional] intent." 14a. Failure to allege that evidence has resulted in immediate dismissal of those claims. 13a. The justification for this "heightened-pleading-with-no-discovery" standard, on which this Court has not yet ruled, rests on serious misreadings of the law by the court below.

The court first ruled that the right respondent was alleged to have violated was not clearly established in October 1985. 14a-16a.[24]

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[22] See, e.g., *Hobson v. Wilson*, 737 F.2d 1 (D.C.Cir.1984); *Martin v. Malhoyt*, 830 F.2d 237 (D.C.Cir.1987); *Smith v. Nixon*, 807 F.2d 197 (D.C.Cir.1986); *Ellsberg v. Mitchell*, 807 F.2d 204 (D.C.Cir.1986); *Halperin v. Kissinger*, 807 F.2d 180 (D.C.Cir.1986); *Whitacre v. Davey*, 890 F.2d 1168 (D.C.Cir.1989).

[23] In *Martin v. D.C. Metro. Police Dept.*, 812 F.2d 1425 (D.C. Cir. 1987), the court made a "one-time" exception, 18a, in permitting limited discovery because that case was "not ordinary," *Martin*, at 1435, and the "approach to pretrial development of cases such as this one was far from clear and certain when the district court made its rulings...." *Id.*, at 1436. In fact, there was nothing out-of-the-ordinary about *Martin*. It involved a run-of-the-mill civil rights conspiracy claim against the city's and federal police. To permit limited discovery in one case because of the uncertainty of the law as to unconstitutional motive would appear to bring the *Martin* panel's decision into direct conflict with the panel here. The law is obviously far from clear on the issue even now.

[24] In ruling on this case, the court below ignored respondent's failure to allege good faith in his motion for summary judgment. Further, it failed to consider whether respondent's acts were discretionary or ministerial in nature. See *infra*.

The cout's ruling was in error.[25] Nevertheless, the claim was not dismissed. Instead, the court correctly found that petitioner's allegations of malice could keep his case alive. 16a-17a. Relying on *Hobson v. Wilson*, 737 F.2d 1 (D.C.Cir.1984), it explained that the allegation of malice was an "essential element," 12a, of petitioner's constitutional claim. If, the court continued, his assertions on this element could meet the circuit's "heightened pleading" standard, respondent's qualified immunity defense would fail. *Id.* It was determined, however, that petitioner's allegations[26] were nothing more than mere "innuendo," 17a, and that these "conclusory allegations" should not subject government officials to the burdens of even limited discovery.

In ruling as it did, here and in prior cases, the court below has taken *Harlow*'s rule, that "bare allegations of malice should not suffice to subject government officials ...to the burdens of *broad-reaching* discovery," *Harlow*, 457 U.S. at 818, (emphasis added), and given it new meaning: in the court's view, "no broad-reaching" discovery means "no discovery at all."

Protecting federal officials from the burdens of trial, including discovery, "*where possible*,"(emphasis added), *Mitchell v. Forsyth*, 472 U.S. at 526, was an essential concern in formulating qualified immunity law. But where a complaint states a violation of clearly established law,[27] and where an essential element of a

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[25] The court failed to consider that the false job assessment may have been a violation of "statutory...rights," *Harlow* at 818, see, e.g., 18 U.S.C. sec. 1001, as well as of constitutional law. 24a.

[26] In his complaint and affidavit opposing respondent's summary judgment motion, petitioner alleged that respondent "had embarked on a course of making [petitioner's] life at St. [E's] unpleasant because he resented petitioner's lengthy medical leave and [his] resistance to respondent's attempts to alter St. [E's] behavior modification program," 24a, that until respondent became his supervisor, petitioner had a history of excellent "job performance" ratings, 24a-25a, and that the language of the letter respondent wrote was "extreme." 25a. The allegations and inferences to be drawn from them provide at least "some evidentiary basis that [respondent's] motives were malicious and...unconstitutional." 24a.

[27] The trial court and the dissent correctly defined the right that petitioner had alleged in his complaint. The right, to expect good faith communication about employment information, leaving for the moment whether the information was ministerial or discretionary in nature, see, *infra*, was clearly established at the

party's *Bivens* claim includes allegations which at least circumstantially evidence unconstitutional motive, there is and should be nothing in the law which proscribes a trial court from permitting limited discovery "tailored specifically to the question of qualified immunity," *Anderson*, at 3042, n. 6, and, more particularly, to the question of a defendant's malicious and unconstitutional intent.

The court's "heightened-pleading-with-no-discovery" standard ignores that formula and places before defendants in this circuit[28] a hurdle not possible to jump. 19a-25a. The standard cuts across the grain of the spirit of the law from pragmatic and policy perspectives. Accordingly, this important issue, whether in order to "stay in court," 20a, litigants must be required to allege without benefit of any discovery direct evidentiary facts as to unconstitutional motive, should be addressed here.[29]

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time. 24a. The majority, however, held otherwise. In distinguishing *Doe, supra*, and *Bartel, supra*, the court found that the defamatory letter was written in response to a *request* for job information rather than spontaneously, and that, therefore, there was no clearly established right for a former employer to communicate to a prospective employer about an employee. Assuming *arguendo* that a request was made, even for discretionary information, it is important to note that the majority did not even consider that the "unlawfulness [of respondent's bad faith act] was apparent" and "sufficiently clear" in light of pre-existing law. *Anderson*, at 639. See also, e.g., 18 U.S.C. sec. 1001. Accordingly, the court should have found that petitioner had stated a claim of a violation of "sufficiently" established law. *Anderson; Mitchell*, at 526.

[28] While it is not absolutely clear, it appears as though rules that at least the Ninth Circuit has announced permit limited discovery when malice has been alleged. See, e.g., *Gibson v. United States*, 781 F.2d 1334, 1340 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987)("...[w]hile a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled...plaintiff is not expected to plead his evidence or specific factual details not ascertainable in advance of discovery"). See also, *Willson v. Cagle*, 711 F. Supp. 1521 (N.D. Cal. 1988). Other circuits may also agree with this logical position. See *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988); *Sutton v. United States*, 819 F.2d 1289 (5th Cir. 1988); *Dowling v. City of Philadelphia*, 855 F.2d 136 (3rd Cir. 1988).

[29] Put another way, this Court should clarify whether malice can be construed as an "essential element" of a party's *Bivens* claim, and if it can, whether it must be subjected to a "heightened-pleading-with-no-discovery" standard, as suggested by the lower court or, as petitioner argues, may malice be pleaded generally as

B. This Court Has Not Ruled On The Lower Court's "Heightened Pleading" Standard Which Conflicts With Rules 8(a)(2) And 9(b), Federal Rules Of Civil Procedure.

In 1958 Congress created and authorized the Judicial Conference of the United States to "make a continuous study of the rules of practice and procedure...to promote simplicity in procedure, fairness in administration, the just determination of litigation and the elimination of unjustifiable expense and delay...." 28 U.S.C. §331. Pursuant to Congress's directive, committees were appointed by this Court to issue reports and make recommendations for this Court's consideration and adoption, or modification or rejection as to changes in or additions to the federal rules of practice. *Id.* Rules 8(a)(2) and 9(b) of the Federal Rules of Civil Procedure have been studied, occasionally modified and approved over the years, and in combination, they still make it plain that in claims where malice is alleged, this "condition of the mind may be averred generally." Rule 9(b). On its face and as applied, the circuit's "heightened pleading" requirement conflicts with the meaning of the rules head-on.

It is now well-established that the purpose of the federal rules of procedure:

> "...rejects the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome, and the principle is accepted that the purpose of pleading is to facilitate a proper decision on the merits."

Conley v. Gibson, 355 U.S. 41 (1957)(Black, J.). Further, it is long-settled policy that the system which this Court adopted for pleading should be "uniform...for all [types] of cases." *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir.1957)(Clark, C.J.).

That policy's uniform and "simplified," *Conley v. Gibson, supra*, system, embodied in Rule 8(a)(2), was designed to give the opposing party fair notice of the nature and basis or grounds of the

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an essential element of the claim, with an order for immediate discovery tailored specifically to support that facet of the suit prior to final disposition of a summary judgment motion.

claim and a general indication of the type of litigation involved. *Conley v. Gibson*, *supra*. See also, Wright & Miller, *Federal Practice & Procedure*: Civil 2d, §1215. To expect a plaintiff to plead "with particularity," Rule 9(b), as to the malice that was in a defendant's mind is to take the "keystone" *id.*, at §1202, of the system of pleading and turn it on its head. Moreover, that expectation as reflected in the lower court's standard directly clashes with the plain meaning of Rule 9(b).

Unlike allegations of "fraud" and "mistake," which *must* be pleaded "with particularity," Rule 9(b), malice and other states of mind may unquestionably be averred "generally." *Id.* Thus, even in cases where a qualified immunity from suit has been alleged, and notwithstanding the important policies which were considered in formulating qualified immunity rules, malice may nevertheless be generally pleaded. That is precisely what petitioner did, consistent with and in reliance on the letter of the law. His claim should not, accordingly, have been dismissed under the rubric of a standard of pleading so squarely contrary to Judicial and Congressional intent.

II. The Question Of Whether A Federal Official May Be Entitled To Qualified Immunity Without Regard To Whether The Challenged Conduct Was Discretionary In Nature Is An Important Federal Question Which Should Be Settled By This Court.

A. Under *Westfall, et al. v. Erwin et ux.*, 484 U.S. 292, 98 L.Ed 2d 619 (1988) A Federal Official Should Not Be Entitled To Qualified Immunity Without Regard To Whether The Challenged Conduct Was Discretionary In Nature.

In the court below petitioner argued that the request for all information on "job performance" and "credentials" were common bureaucratic "terms of art." He therefore urged that a response to the Credential Information Request Form required not "judgments surrounding discretionary action [which are]...influenced by... experiences, emotions and values," *Harlow*, at 816, but rather a response which was a non-policy-making "function," *Westfall v. Erwin*, ___U.S.___, 98 L.Ed. at 625, n. 3; *Forrester v. White*, ___U.S.___, ___, 108 S.Ct. 538, 544 (1988)("immunity is justified and defined by the *functions* it protects and serves...."), that is, an objective, ministerial act. Respondent, however, did not respond to the standardized Form at all. Instead, he gave the Army a wholly subjective and unsolicited letter of "reference" which is the subject of petitioner's claim.

The court below cursorily addressed this material fact[30] in dispute: "Although there is some dispute as to whether the evaluation sought here was 'subjective' or 'objective,'" the issue itself was irrelevant to a qualified immunity determination. [11 slip] ?a. Under *Westfall v. Erwin*, the court was clearly wrong.

As it was held to be in *Westfall* in the absolute immunity sphere, whether or not an act is discretionary should be a condition precedent to deciding whether an official is entitled to qualified immunity from suit.[31] The "central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from... [constitutional] tort liability without regard to whether the alleged tortious conduct is discretionary in nature." *Westfall*, at 626.

Respondent defined the request that was made by the Army as one for a job "reference." Petitioner, on the other, alleged that what St. E's was asked to do was to objectively respond to a form in a way that did not even "involve some modicum of choice." *Westfall*, at 627.[32] Thus, a fact that was "critical," *Westfall*, at

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[30] In petitioner's statement of material facts at issue which was filed pursuant to a local trial court rule, he stated that "defendant's position at St. Elizabeths was as a low level, *non-policy-making* supervisor." (Emphasis added).

[31] As qualified immunity has tracked absolute immunity as to appeals under the collateral order doctrine, *Mitchell v. Forsyth*; *Martin v. D.C. Metro. Police Dept.*, *supra*, at 1428, n. 10, so, too, should the it track absolute immunity for purposes of this issue.

[32] Petitioner does not suggest that an official should not be subjectively candid in responding to requests for references about former employees. Respondent's response, however, was not an "*appropriate* exercise of [his] function," *Forrester v. White*, ___U.S.___, 108 S.Ct. 538, ___, 542 (1988), (emphasis added) under the circumstances of this case. This is particularly true when considered in the light of petitioner's having informed St. E's, before his resignation,

626; *Doe v. McMillan*, 412 U.S. 306 (1973), to a qualified immunity determination was plainly in dispute, and, as a consequence, respondent's qualified immunity defense should, likewise, have plainly failed. *Westfall*, at 627-628.

As it did in *Westfall* in the context of absolute immunity analysis, and from a "consistency" perspective, whether a qualified immunity defense should succeed without regard to whether the official's act was discretionary needs to be answered by this Court.

Conclusion

For the foregoing reasons, this petition for certiorari should be granted. If petitioner is correct in urging that the United States Court of Appeals for the District of Columbia erred in reversing the decision of the trial court, the matter should be reversed and remanded for appropriate disposition.

Respectfully submitted,

Nina Kraut

3815 Yuma Street, NW
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Counsel of Record

July 13, 1990

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that he had a contract for a job as a clinical psychologist. Had respondent genuinely been concerned with petitioner's "ineptness," he would have immediately written to the petitioner's new employer, or would have, and should have, contacted the psychology licensing boards, prior to petitioner's resignation.

No. _____

IN THE

Supreme Court Of The United States

October Term, 1990

FREDERICK A. SIEGERT,

Petitioner

v.

H. MELVYN GILLEY,

Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nina Kraut
3815 Yuma Street, NW
Washington, DC 20016
202/745-0300
Counsel of Record

July 13, 1990

Civ. Action No. 86-3234

United States District Court

FOR THE DISTRICT OF COLUMBIA

Filed May 7, 1990

Frederick A. Siegert, Ph.D.

Plaintiff,

v.

H. Melvyn Gilley, Ph.D.,

Defendant.

ORDER

Pursuant to the opinion issued in this case by the Court of Appeals, *see Siegert v. Gilley*, No. 88-5257, slip op. (D.C. Cir. Feb. 9, 1990), and in compliance with the instructions contained therein, and given that the mandate in this case has been issued, it is this 7th day of May 1990, hereby

ORDERED that this case is DISMISSED.

Stanley Sporkin
United States District Judge

No. 88-5257

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1989 C.A. 86-03234 Filed April 16, 1990

Frederick A. Siegert, Ph.D.

v.

H. Melvyn Gilley, Ph.D.,

Appellant

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle and Thomas, Circuit Judges

ORDER

Appellee's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner
Deputy Clerk

A statement of Chief Judge Wald concurring in the denial of rehearing *en banc* is attached.

Siegert v. Gilley, No. 88-5257

WALD, *Chief Judge*, concurring in the denial of rehearing *en banc*: Our court's "heightened pleading standard" which requires of plaintiffs a formidable threshold showing of nonconclusory facts demonstrating a government official's unconstitutional motive, raises serious questions of fairness and justification under existing Supreme Court precedent, especially when, as in this case, plaintiffs are precluded from obtaining through discovery the information necessary to make the necessary showing. Although the question is one of "exceptional importance," Fed. R. App. Proc. 35(a), I am satisfied that an *en banc* rehearing at this time would not alleviate the problem, which must ultimately be clarified by the Supreme Court.

No. 88-5257

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1989 C.A. 86-03234 Filed: April 16, 1990

Frederick A. Siegert, Ph.D.

v.

H. Melvyn Gilley, Ph.D.,

Appellant

BEFORE: Wald, Chief Judge; Buckley and D.H. Ginsburg, Circuit Judges

ORDER

Upon consideration of Appellee's Petition for Rehearing, filed March 26, 1990, it is

ORDERED, by the Court, that the Petition is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE, CLERK
BY:

Robert A. Bonner
Deputy Clerk

Chief Judge Wald would grant the Petition for Rehearing.

No. 88-5257

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Frederick A. SIEGERT, Ph.D.

v.

H. Melvyn GILLEY, PhD.,

Appellant.

Argued Oct. 11, 1989.

Decided Feb. 9, 1990.

Former government employee brought action against supervisor, alleging that supervisor, in response to request for information on job performance, wrote letter defamatory of employee, causing him reputational harm and loss of other government positions for which he had applied, and depriving him of constitutionally protected liberty interest without due process. The United States District Court for the District of Columbia, Stanley Sporkin, J., 692 F.Supp. 1406, denied defendant's motion to dismiss or alternatively for summary judgment based on qualified immunity, and defendant appealed. The Court of Appeals, Buckley, Circuit Judge, held that: (1) constitutional right claimed by plaintiff was not so clearly established that a reasonable person would have known that a candid response to official inquiry regarding job performance might give rise to liability for damages, and (2) conclusory allegation that letter was written maliciously and in bad faith did not satisfy heightened pleading standard for *Bivens* claims alleging unconstitutional motive.

Reversed and remanded with instructions.

Wald, Chief Judge, filed an opinion dissenting in part.

1. Federal Courts 542

Court of Appeals had duty to raise sua sponte issue of its own jurisdiction.

2. United States 50.20

Inquiry into subjective intent unrelated to knowledge of the law is permissible when conducting a qualified immunity inquiry into a *Bivens* claim where the constitutional violation turns on an unconstitutional motive; however, under heightened pleading standard, in order to obtain even limited discovery, such intent must be pleaded with specific, discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent.

3. United States 50.10(4)

Supervisor was entitled to qualified immunity from *Bivens* claim brought by former government employee based on allegation that supervisor wrote letter defamatory of employee in response to request for information on job performance, causing him reputational harm and loss of other government positions for which he had applied, thereby depriving him of a constitutional protected liberty interest without due process; constitutional right claimed by employee was not so clearly established that a reasonable person would have known that a candid response to inquiry regarding job performance might give rise to liability for damages. U.S.C.A. Const. Amend. 5.

4. United States 50.20

Government employee's conclusory allegation that supervisor, in response to request for information on employee's job performance, wrote defamatory letter with bad faith and malice, did not satisfy heightened pleadings standard for *Bivens* claims alleging unconstitutional motive; absent any direct evidence that letter was in fact written maliciously, supervisor could not be forced to endure discovery, and was entitled to qualified immunity.

Appeal from the United States District Court for the District of Columbia (D.C. Civil No. Misc. 86-3234).

John M. Facciola, Asst. U.S. Atty., with whom Jay B. Stephens, U.S. Atty., and John D. Bates, R. Craig Lawrence, and Michael L. Martinez, Asst. U.S. Attys., Washington, D.C., were on the brief, for appellant.

Nina Kraut, Washington, D.C., for appellee.

Before WALD, Chief Judge, and BUCKLEY and D.H. GINSBURG, Circuit Judges.

Opinion for the court filed by Circuit Judge BUCKLEY.

Opinion dissenting in part filed by Chief Judge WALD.

BUCKLEY, Circuit Judge:

This appeal involves a suit by Dr. Frederick Siegert, a psychologist, against Dr. Melvyn Gilley, his one-time supervisor at a government hospital. Both are government employees. The complaint alleges that Gilley, in response to a request for information on job performance, wrote a letter defamatory of Siegert, causing him reputational harm and the loss of other government positions for which he had applied. Siegert further alleges that Gilley wrote the letter maliciously and in bad faith, thus depriving him of a constitutionally protected liberty interest without due process.

Defendant Gilley appeals an order of the district court denying his motion to dismiss or alternatively for summary judgment based on qualified immunity grounds. Because we find that Siegert's allegations do not meet the heightened pleading standard established by our prior decisions for cases involving claims of immunity, we reverse the district court and remand with instructions to dismiss.

I. BACKGROUND

Plaintiff Siegert was a psychologist employed by the federal government at St. Elizabeths Hospital in Washington, D.C. from November 1979 until October 1985 as a Behavior Therapy Coordinator specializing in work with mentally retarded children and,

to a lesser extent, with adults. In January 1985, defendant Gilley became head of the division for which Siegert worked. The following month, Siegert was allegedly struck on the head by a patient. He claims he took a significant amount of medical leave as a result, although he was erroneously recorded as absent without leave.

St. Elizabeths notified Siegert in late August that it was preparing to terminate him. After a meeting with hospital officials, it was arranged that Siegert would resign from the hospital and thus avoid a termination that might damage his reputation. He had been planning a move in any event, he asserts, because he had experienced personal antagonism with Gilley. He had in fact already signed a 36-month contract to serve as a clinical psychologist at a U.S. Army medical facility in Bremerhaven, West Germany.

Siegert resigned from St. Elizabeths in October and took his position with the Army. Because of the requirement that he be "credentialed" to work in hospitals operated by the Army, Siegert signed a "Credential Information Request Form" asking that St. Elizabeths provide "all information on job performance and the privileges" he had enjoyed while a member of its staff to his prospective supervisor, Lt. (now Col.) William Smith. This request was referred to Gilley who, on October 23, 1985, wrote Smith that he considered Siegert to be inept, unethical, and one of the least trustworthy persons he had supervised during his thirteen years at St. Elizabeths.

Subsequently, Siegert was denied the credentials. He was also turned down for a position he later sought with an Army hospital in Stuttgart. He was thereafter given provisional credentials, but they were limited to work with adults. Although credentialing appeals are still pending, Siegert has been removed from the behavior therapy program and given work in an Army medical library, work he claims is in no way comparable to his previous responsibilities.

After learning of Gilley's letter to Smith, Siegert filed this action in the United States District Court for the District of Columbia alleging that Gilley's defamatory statements had

deprived him of liberty without due process, a violation of his Fifth Amendment rights for which he seeks damages under the doctrine of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In addition, Siegert brought claims under the court's pendent jurisdiction. Defendant Gilley moved for dismissal or in the alternative for summary judgment based on his defense of qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 Ed.2d 396 (1982).

The district court denied the motion to dismiss or for summary judgment on the ground that the record was insufficiently developed. The court ordered discovery limited to the taking of depositions from the parties and Col. Smith. *Siegert v. Gilley*, Civ. Action No. 86-3234, Order at 3, 1987 WL 27640 (D.D.C. Dec. 3, 1987). Gilley moved for reconsideration and for a stay of discovery pending resolution of his immunity claim.

On June 30, 1988, the court denied the motion to reconsider. *Siegert v. Gilley*, 692 F.Supp. 1406 (D.D.C.1988). The court only "reluctantly wrote this opinion because of counsel for the defendant's insistence that I had no right to establish a limited discovery schedule prior to issuing an opinion on the qualified immunity defense." *Id.* at 1420. The district court found that plaintiff had alleged a violation of a constitutionally protected liberty interest that was clearly established in the case law at the time of defendant's conduct. *Id.* at 1418. The court concluded that "[Gilley's] qualified immunity defense therefore fails," *id.*, and that Siegert had established a proper basis for a *Bivens* claim. *Id.* at 1419.

Defendant then filed this appeal. In an order issued on January 9, 1989, we rejected Siegert's motion to dismiss for want of a final order on the ground that a denial of a claim of qualified immunity is immediately appealable (citing *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)).

II. DISCUSSION

A. Scope of Appellate Jurisdiction

[1] The first issue before us is the scope of our jurisdiction to hear this appeal. Although the parties do not argue the question, this court has a duty to raise *sua sponte* the issue of its own jurisdiction. *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 740, 96 S.Ct. 1202, 1204, 47 L.Ed.2d 435 (1976). While it is well established that a denial of a claim of qualified immunity is immediately appealable, *Mitchell*, 472 U.S. at 530, 105 S.Ct. at 2817, the parties argue not only this issue, but also the district court's finding that a *Bivens* remedy is available in this case. For the reasons that follow, we conclude that our inquiry at this time is limited to the sole question of the district court's rejection of Gilley's claim of qualified immunity.

The statute establishing the parameters of appellate jurisdiction provides as follows:

> The courts of appeals ... shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States....

28 U.S.C. § 1291 (emphasis added). Because the proceeding before the district court has not been terminated, this appeal may only be heard because it involves an appeal from a special category of district court decisions identified by the Supreme Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). That category consists of final determinations of

> rights asserted in [an] action [that are] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Id. at 546, 69 S.Ct. at 1226. Typically, they involve rights which if not subject to immediate appeal may be lost irreparably. *Id.*

In this case, the collateral matter is the right asserted by Gilley not to be forced to trial or discovery because of his qualified immunity. In *Mitchell v. Forsyth*, 472 U.S. at 526-27, 105 S.Ct. at 2815-16, the Supreme Court recognized that the essence of a claim

of qualified immunity is that the immunized party has a positive right not to be brought to trial, and that this right is effectively lost once the case proceeds to trial. See also *Minotti v. Lensink*, 798 F.2d 607, 608 (2d Cir.1986) (denial of motion to dismiss for Eleventh Amendment immunity is immediately appealable because "the essence of the immunity is the possessor's right not to be haled into court—a right that cannot be vindicated after trial").

In this respect, Gilley's claim of immunity is distinct from his other defenses. It alone can be characterized as a defense that is finally determined by the court and lost if the case goes to trial. In contrast, Gilley's claim that he committed no constitutional violation or that there is no cause of action under *Bivens* are both claims that even if decided against him by the district court can be meaningfully vindicated through the normal course of appeal and reversal. Moreover, the *Bivens* issue might never come before us if the district court finds plaintiff's claim inadequate on other grounds. We conclude, then, that the only issue now properly before us on appeal is that of Gilley's qualified immunity.

B. Heightened Pleading Standard for *Bivens* Claims Alleging Unconstitutional Motive

In determining the validity of defendant's claim of immunity as a government official, we begin by recognizing the recasting of qualified immunity law in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 LEd.2d 396 (1982). Prior to *Harlow*, the prevailing standard contained both objective and subjective elements; thus a federal official's claim of immunity would be defeated if "he knew or reasonably should have known" that his actions would violate an individual's constitutional rights, or if he "took the action with the malicious intention to cause a deprivation of constitutional rights or other injury...." *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1001, 43 LEd.2d 214 (1975) (emphasis in original). The *Harlow* Court recognized that under the *Strickland* rule, one of the primary goals of the qualified or "good faith" immunity doctrine, the termination of meritless claims at the earliest possible stage of a litigation, was frustrated by the discovery required to prove the subjective element. 457 U.S. at 815-16, 102 S.Ct. at 2736-37. Therefore, the Court concluded that "bare allegations of

malice [would] not suffice to subject government officials to the costs of trial or burdens of broad-ranging discovery." *Id.* at 817-18, 102 S.Ct. at 2738. Instead, to overcome the qualified immunity that ordinarily attaches to government officials performing discretionary functions, a plaintiff must show that the defendant violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S.Ct. at 2738. The Supreme Court has subsequently described that "reasonable person" standard as having "purged qualified immunity doctrine of its subjective components," *Mitchell v. Forsyth*, 472 U.S. 511, 517, 105 S.Ct. 2806, 2810, 86 L.Ed.2d 411(1985), and as having "rejected inquiry into state of mind in favor of a wholly objective standard." *Davis v. Scherer*, 468 U.S. 183, 191, 104 S.Ct 3012, 3017, 82 L.Ed.2d 139 (1984).

As we pointed out in *Halperin v. Kissinger*, 807 F.2d 180, 186-87 (D.C.Cir.1986), it is by no means clear that the Supreme Court intended this expansive language to preclude any inquiry into subjective motivation. Thus in *Martin v. D.C. Metro. Police Dep't*, 812 F.2d 1425 (D.C.Cir.1987), we read *Halperin* as saying that the *purely* objective standard of inquiry was reserved for the national security context, and that otherwise

> when the governing precedent identifies the defendant's intent (unrelated to knowledge of the law) as an essential element of plaintiff's constitutional claim, the plaintiff must be afforded an opportunity to overcome an asserted immunity with an offer of proof of the defendant's alleged unconstitutional purpose.

Id. at 1433 (citations omitted).

Having determined that plaintiff must be afforded the opportunity to prove such allegations of unconstitutional motive, we now turn to the wholly separate inquiry into the standard of pleading required of plaintiffs in cases involving such allegations. In *Hobson v. Wilson*, 737 F.2d 1, 29-30 (D.C. Cir.1984), we first recognized the danger that plaintiffs might allege facts consistent with lawful conduct and append a claim of unconstitutional motive, thus imposing on officials the very costs and burdens of discovery and possibly trial that *Harlow* intended to spare them. *Id.*

at 29. We then concluded, in *dicta*, that in claims of unconstitutional motive, plaintiffs must come forward with some "nonconclusory" allegations of evidence in order to proceed. *Id.*

In *Smith v. Nixon*, 807 F.2d 297 (D.C.Cir.1986), we adopted the *Hobson* rationale and held that damage actions against government officials are subjected to a heightened pleading standard, so that "bare allegations of improper purpose, like the bare allegations of malice rejected in *Harlow*, do not suffice to drag officials into the mire of discovery." *Id.* at 200 (citations omitted). And in *Martin v. D.C. Metro. Police Dep't*, the same case in which we recognized the need to allow offers of proof of unconstitutional motive, we nonetheless recognized that such an offer must conform to a higher standard than that generally provided for in the Federal Rules:

> Where the defendant's subjective intent is an essential component of plaintiff's claim, once defendant has moved for pre-trial judgment based on a showing of the objective reasonableness of his action, then plaintiff, to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some direct evidence that the officials' actions were improperly motivated must be produced if the case is to proceed to trial.

812 F.2d at 1435.

Most recently, in *Whitacre v. Davey*, 890 F.2d 1168 (D.C. Cir.1989), we considered a *Bivens* claim alleging age-based discrimination in violation of the Fifth Amendment. We found that the complaint, as it alleged an unconstitutional motive, had to include "nonconclusory allegations of evidence of such intent in order to survive a motion to dismiss." *Id.* at 1171 (internal quotations omitted). "If a plaintiff fails to allege direct evidence of unconstitutional intent, his claim must be dismissed immediately." *Id.* at 1171 n. 4. Thus, *Whitacre* makes clear that discovery is not to be allowed until plaintiff has alleged the existence of direct evidence of impermissible motive.

[2] To summarize the applicable law: Inquiry into subjective intent unrelated to knowledge of the law is permissible where the constitutional violation turns on an unconstitutional motive. Nonetheless, under this court's heightened pleading standard, in order to obtain even limited discovery, such intent must be pleaded with specific discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent.

C. Application in this Case

To overcome Gilley's defense of immunity, Siegert may plead one of two types of claims. If he alleges that the action was objectively unlawful, he must plead that no reasonable official in Gilley's position "could have believed [his actions] to be lawful, in light of clearly established law...." *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987). In the alternative, if the alleged constitutional violation turns on some element of subjective intent, then Siegert must plead the unconstitutional motivation and do so with the offer of proof required by our heightened pleading standard.

While we believe Siegert's suit is grounded in his allegations of bad faith and malice, an indulgent reading of the complaint would also find, in its reference to defamation *per se*, an allegation of a cause of action under clearly established law that is independent of the element of intent. This appears to have been the district court's reading of the complaint as the bulk of its analysis is devoted to comparing Siegert's situation with those addressed in our prior decisions in *Doe v. United States Dep't of Justice*, 753 F.2d 1092 (D.C.Cir.1985), and *Bartel v. FAA*, 725 F.2d 1403 (D.C.Cir.1984), cases that did not involve claims of impermissible subjective intent. Adopting this reading, we nevertheless find that Siegert has failed both of the routes that lead to overcoming Gilley's official immunity in this case.

1. *Objective Legality of Gilley's Actions in Light of Pre-existing Law*

[3] The Supreme Court's recent decision in *Anderson* makes clear that the constitutional right alleged to have been violated is not to be defined in such abstract terms as to make it "impossible for officials reasonably to anticipate when their con-

duct may give rise to liability for damages." *Id.*, 483 U.S. at 639, 107 S.Ct. at 3039 (internal quotation omitted). Rather,

> the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Id. at 640, 107 S.Ct. at 3039. While the Court noted that the very act in question need not have been held unlawful, nonetheless "in the light of pre-existing law the unlawfulness must be apparent." *Id.*

While the district court seems to have recognized this principle, 692 F.Supp. at 1412, it has misapplied the standard to the facts of this case. The district court relied on *Doe* and *Bartel* to establish that it is a violation of a constitutionally protected liberty interest when "the government is the source of the defamatory allegations and the resulting stigma involves some tangible change of status vis-a-vis the government." *Siegert* 692 F.Supp. at 1415 (internal quotations omitted).

Although *Doe* and *Bartel* may stand for that proposition, and although the district court attempts an analogy between this case and *Bartel*, 692 F.Supp. at 1416, the effort fails because the court's definition of the right at issue in this case was insufficiently particularized to meet the requirements of *Anderson*. *Doe* involved the discharge of a Department of Justice employee who was at the same time accused by her supervisors of unprofessional conduct and dishonesty; it did not involve, as this case does, a response by a government official to a request for information about a former employee from a prospective government employer.

This is not an insignificant difference. Common law defamation itself recognizes both that there is a qualified privilege for reports on employees to prospective employers, Smolla, Law of Defamation § 8.08[2][d], and that the privilege is more likely to be applicable when the information given is in response to a request rather than volunteered. *Id.* § 8.08[2][b]. These common law privileges carry over into our due process analysis as it is the

government's involvement, through Gilley, that "transforms a [common law] defamation into a [constitutional] deprivation of liberty." *Doe*, 753 F.2d at 1108 (internal quotation and citation omitted). Even if the district court were to be found correct in its view that there is no constitutionally significant difference between terminating an employee directly amidst stigmatizing allegations and merely responding to a solicitation for a job reference, such a view cannot be said to follow ineluctably from *Doe*.

Bartel fares no better. While that case did involve a supervisor who, upon hearing of a former employee's attempt to gain another position, sent letters to several Federal Aviation Administration officials critical of the plaintiff, the letters were not sent in response to a request for an evaluation of a former employee. They were volunteered. In the instant case, by contrast, Gilley responded to a request for information about the employee's performance. Although there is some dispute as to whether the evaluation sought here was "subjective" or "objective," the relevant question, under *Anderson*, is not whether Gilley misunderstood the nature of the information requested, but whether the constitutional right claimed by Siegert was so clearly established that a reasonable person would have known that a candid response to such an official inquiry might give rise to liability for damages.

We conclude that while *Doe* and *Bartel* illustrate circumstances in which a government official's stigmatizing comments will violate a former employee's protected liberty interest by effecting a change in his status vis-a-vis the government, they do not "clearly establish," within the meaning of *Harlow*, that Gilley's actions amounted to such a violation.

2. *The Heightened Pleading Standard Applied to Siegert's Claim of Unconstitutional Motive*

[4] Siegert's central contention, of course, is that defendant wrote the letter with bad faith and malice; and in light of our analysis immediately above, it represents the only basis on which he can hope to overcome Gilley's claim of privilege. We assume, without deciding, that such bad faith motivation would suffice to make Gilley's actions in writing the letter a violation of Siegert's

constitutional rights, and that the process given by the credentialing review was not adequate to meet due process requirements. Nonetheless, we find that the invalidating motivation has not been pleaded with the offer of noncircumstantial proof required to satisfy our heightened pleading standard. *Cf. Whitacre*, 890 F.2d at 1171.

Siegert's allegation of malice is unsupported by any evidence beyond innuendo about "long-standing and consistent professional and personal friction between defendant and himself." Amended Complaint, para. 6. The complaint's shortcoming is most evident in its allegations that Gilley had acted in bad faith when he described Siegert as inept, unethical, and untrustworthy. *Id.* at para. 11. It merely asserts (and reasserts) that in making the statement he "knew [it] to be false or [made it] with reckless disregard as to whether it was true," *id.* at paras. 11 and 23, and that he "maliciously and in bad faith attempted to destroy ... plaintiff's ability to earn a livelihood as a clinical psychologist." *Id.* at para. 21. Nor did the affidavit submitted by Siegert in support of his Statement of Material Facts at Issue add anything more tangible to the record than the assertions that prior to the time Gilley became his supervisor, he had received exemplary job performance ratings, had never had his professional integrity questioned, and that his resistance to certain changes Gilley wished to make in St. Elizabeths' programs was the source of Gilley's hostility towards him. Affidavit of Frederick A. Siegert dated January 28, 1988, paras. 4-5.

As we emphasized in *Hobson*, "conclusory allegations" of this sort will not suffice to subject government officials to the burdens of discovery or trial. 737 F.2d at 290. *Hobson* itself provides an example of allegations of direct evidence of improper motivation that will overcome a defense of qualified immunity. In that case, it was alleged that the Federal Bureau of Investigation and District of Columbia law enforcement authorities had violated plaintiffs' First and Fifth Amendment rights pursuant to an organized plan, known as "COINTELPRO-New Left," that was "designed to conduct surveillance upon and to cause disruption of" plaintiffs' protected political activities. *Id.* at 27. The complaint referred to specific memoranda admitting that the program's ex-

press purpose was to disrupt plaintiffs' political activities. *Id.* at 10. We easily found these allegations to be "neither general, conclusory, nor devoid of factual support " *Id.* at 31.

Siegert has alleged nothing remotely comparable. His assertions are no less inferential than the factual support offered by the plaintiffs in *Martin* that we rejected as insufficient. 812 F.2d at 1486. In that case, which involved charges of malicious prosecution by District of Columbia police officers, the plaintiff alleged that the defendant had reviewed video tapes of newscasts showing policemen beating him with nightsticks, that the plaintiff was the only person identified and marked for prosecution as a result of that review, that the defendants had worked closely with the U.S. Attorney in deciding on his subsequent arrest and prosecution, and that an unusually large team of officers had effected his arrest. 812 F.2d at 1485. We remarked that although in the ordinary case such circumstantial evidence "might allow a plaintiff to remain in court," in light of *Harlow*, it was insufficient to override a defense of qualified immunity. While it is true that in *Martin* we allowed limited discovery, we did so only as a "one-time exception" because of the special exigencies in that case. *Whitacre*, 89 F.2d at 1171 n. 4 (citing *Bartlett v. Bowen*, 824 F.2d 1240, 1246 (D.C. Cir.1987)).

It might be argued, nevertheless, that the highly restricted discovery ordered by the district court in this case is supported by the Supreme Court's decision in *Anderson*. In a footnote to its opinion, the Court suggested that if a plaintiff alleges actions that no reasonable official could believe lawful, and the defendant in turn alleges he in fact took *different* actions that a reasonable official *could* believe lawful, then limited discovery "tailored specifically to the question of [defendant's] qualified immunity" might be necessary. 483 U.S. at 646-47 n. 6, 107 S.Ct. at 3042 n. 6. This is not the situation before us. The purpose of the inquiry ordered by the district court in this case was not to establish the factual basis for determining the objective legal reasonableness of Gilley's actions, but to inquire into their motivation. This is precisely the kind of subjective inquiry that *Harlow* found impermissible. 457 U.S. at 817, 102 S.Ct. at 2737.

III. CONCLUSION

The requirements of our heightened pleading standard are clear. But instead of meeting them, Siegert asks the court to infer from his claims of personal friction, exemplary job performance ratings before Gilley became his supervisor, and his conclusory assertion that defendant knew his statements to be false, that Gilley wrote the letter with a constitutionally impermissible intent. As Siegert has failed to offer any direct evidence that the letter was written maliciously, we see no basis for submitting Gilley to the burden of discovery.

Accordingly, we reverse the district court's denial of defendant's motion for reconsideration, vacate the court's order that the parties proceed with discovery, and remand with instructions that the case be dismissed.

It is so ordered.

WALD, Chief Judge, dissenting in part:

This case brings into sharp focus a dilemma created by our circuit's current jurisprudence on qualified immunity: plaintiffs are required to adhere to a "heightened pleading standard" of nonconclusory facts that demonstrate a government official's unconstitutional motive, but they are entirely restricted from obtaining through discovery the information necessary to make that showing. While I do not agree completely with the trial judge's resolution of the qualified immunity issue, I also find the majority's outright dismissal of Siegert's action unnecessary and inappropriate in the circumstances of this case. Although I too would vacate the trial judge's finding of no qualified immunity, I would allow a limited discovery, similar to that ordered by the judge, to proceed on remand to permit the plaintiff to make a showing of unconstitutional motive, if he can.

I. THE HEIGHTENED PLEADING STANDARD

The qualified immunity defense is designed to prevent "bare allegations of malice" from subjecting government officials to the disruptions of litigation, including "the burdens of broad-reaching discovery." *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

Consistent with this instruction, this circuit has required plaintiffs challenging qualified immunity defenses to provide "some factual allegations [to] support claims of unconstitutional motive" on the part of defendant officials. *Hobson v. Wilson*, 737 F.2d 1, 30 (D.C.Cir.1984). This heightened pleading standard "bears on the degree of *factual* specificity required in plaintiff's complaint." *Martin v. Malhoyt*, 830 F.2d 237, 254 n. 41 (D.C. Cir.1987) (emphasis in original). It is applied once the defendant makes a showing of the objective legal reasonableness of his actions; at that point, plaintiffs must offer "some direct evidence that the officials' actions were improperly motivated" to avoid pre-trial dismissal. *Martin v. D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1435 (D.C.Cir. 1987).

A plaintiff who has good reason to suspect but lacks specific evidence of an official's unconstitutional motive therefore faces a threshold problem: how to gain enough information to survive the defendant's motion to dismiss or motion for summary judgment on the grounds of qualified immunity. The majority offers a straightforward answer: "If a plaintiff fails to allege direct evidence of unconstitutional intent, his claim must be dismissed immediately." Maj.Op. at 802 (citing *Whitacre v. Davey*, 890 F.2d 1168, 1171 n. 4 (D.C.Cir.1989)). If the plaintiff cannot plead "specific, discernible facts or offers of proof that constitute direct... evidence of the intent," he is out of court. Maj.Op. at 802.

II. THE ROLE OF LIMITED DISCOVERY

I believe that this application of the "heightened pleading standard" reflects a misguided approach to our "twin goals" of "limit[ing] the litigation burdens placed on government officials by 'insubstantial' lawsuits" and "preserving the opportunity for plaintiffs to vindicate constitutional rights." *Martin v. D.C. Police*, 812 F.2d at 1439 (Edwards, J., concurring) (citing *Hobson*). In my view, the heightened pleading standard, as originally articulated by this court, did not rule out the opportunity in appropriate circumstances, where proof of the defendant's motive is peculiarly in the defendant's hands, for plaintiffs to examine the defendant's motive through limited discovery, directed and supervised by the trial court.

In *Hobson*, we expressly noted that "in some circumstances plaintiffs are able to paint only with a very broad and speculative brush at the pre-discovery stage, and that overly rigid application of the rule we articulate could lead to dismissal of meritorious claims." 737 F.2d at 331. We warned that plaintiffs who could not allege any specific facts supporting a claim of unconstitutional motive "cannot expect to involve Government actors in *protracted* discovery and trial." *Id.* at 30 (emphasis added). This comment, however, implicitly left open the possibility of some limited discovery before a final ruling on the qualified immunity claim.

In *Martin v. D.C. Police*, we vacated the district judge's dismissal of a qualified immunity defense on the grounds that she had not properly considered whether the complaint contained the factual specificity required by the heightened pleading standard. 812 F.2d at 1436. Rather than dismissing the case outright, however, we deferred a decision on qualified immunity pending limited, particularized discovery, monitored with "particular care and sensibility." *Id.* at 1437-38. *Martin* clearly indicated that "carefully circumscribed," "sharply limited" discovery ordered by the district judge is consistent both with preserving plaintiffs' constitutional rights and with enabling Government officials to avoid the rigors of "protracted" discovery. *Id.* at 1438-39 (Edwards, J., concurring); *id.* at 1437-38 (majority opinion) (noting district judge's discretion to defer decision on summary judgment motion to allow opponent of motion to pursue discovery).

In light of these precedents, I am deeply disturbed by the trend in our more recent cases, seeming to rule out categorically a trial judge's discretion to order such limited discovery, even in cases where he concludes it will be of genuine assistance and is not being pursued simply to harass the defendant. In so doing, we run the risk of applying the heightened pleading standard with needless insensitivity to both a legitimate plaintiff's plight, and to a district judge's perceptiveness in distinguishing a legitimate plaintiff from a frivolous one. In *Martin v. Malhoyt*, the panel reversed the district court's limited discovery order on the grounds that the plaintiffs had not made out even a *prima facie* showing of their claim that the defendant police official had countenanced a pattern of illegal police activity. 830 F.2d at 257. More recently, in

Whitacre v. Davey, another panel said that the "degree of specificity needed to make out a Title VII or statutory age discrimination *prima facie* case" did not meet the heightened pleading standard "when the constitutional tort alleged is of the same discrimination genre covered by the antidiscrimination statute." 890 F.2d at 1171. Since the Title VII *prima facie* case is "composed of only circumstantial evidence, and not overwhelming circumstantial evidence at that," it does not meet the "constitutional" heightened pleading standard applied in qualified immunity cases. *Id.* at 1171. And, additionally, absent a plaintiff's allegation of direct evidence of unconstitutional intent, "his claim must be dismissed immediately," that is, without even limited discovery. *Id.* at 1171 n. 4.

This policy of requiring specific, direct evidence of the defendant's unconstitutional intent, when unflinchingly applied to all cases in which a qualified immunity defense is raised, effectively cuts off both bona fide and ill-motivated suits. It blocks a judicial remedy to all plaintiffs who do not have access to the information they need to meet the heightened pleading standard, regardless of their ability to obtain such information without discovery. It is worth remembering that our heightened pleading standard has not as yet even been explicitly approved by the Supreme Court. Without limited discovery, many plaintiffs such as Siegert have no means of obtaining any direct evidence about a defendant supervisor's motive; such evidence, if it exists, most likely is buried in bureaucratic files. By denying even the most circumscribed judicially supervised factfinding into unconstitutional motive, we enable defendants who alone possess that crucial information to hide behind an unmerited shield of qualified immunity. Narrowly tailored discovery, controlled in scope and duration by a trial judge sensitive to the problems of exposing officials to disruptive litigation, on the other hand, allows worthy plaintiffs to mount reasonable challenges to otherwise impenetrable qualified immunity defenses.

Rather than being compelled to require plaintiffs independently to marshal the direct evidence of unconstitutional motive that is often peculiarly in the defendant's possession, the trial judge should be permitted to retain discretion to authorize circumscribed factfinding for plaintiffs who initially indicate with

some plausible evidentiary basis why the defendant's immunity claim will fail. A pleading standard focusing on the likely success of the plaintiff's complaint, rather than the quantity of factual evidence it adduces, would better accommodate both our articulated concerns about the speculative nature of pre-discovery pleadings, *Hobson*, 737 F.2d at 31, and our desire to maintain intact trial judges' "large authority to exercise control over discovery." *Martin v. D.C. Police*, 812 F.2d at 1437. In any event, requiring plaintiffs to "come forward with something more than inferential or circumstantial support for [their] allegation[s] of unconstitutional motive," *id.* at 1435, does not preclude a judge's use of limited discovery to enable a plaintiff to supplement his originally, perhaps necessarily, sketchy complaint.

Such limited discovery is, moreover, fully consistent with the Supreme Court's concern that eligible government officials be immunized from "broad-ranging discovery." *Harlow*, 457 U.S. at 817, 102 S.Ct. at 2737. As a first step in considering a defendant's liability, *Harlow* instructed the trial judge to determine "whether [currently applicable] law was clearly established at the time an action occurred." 457 U.S. at 818, 102 S.Ct. at 2738. "Until this threshold immunity question is resolved," the Court stated, "discovery should not be allowed." *Id.* If the law delineating the official's duty was not clearly established at the time of the alleged violation, the official cannot be held liable for failure to act in the objectively reasonable manner required by *Harlow*. But if the law on which liability is based on clearly established at the time of the alleged violation, "*this* threshold immunity question" (emphasis added) does not end the inquiry. Then, the precise nature of the defendant's alleged violation—for example, whether the defendant acted with a constitutional or unconstitutional motive— is placed squarely in issue in the qualified immunity determination. As a result, discovery "tailored specifically to the question of [the defendant's] qualified immunity" "may be necessary" before the trial judge can rule on the defendant's summary judgment motion. *Anderson v. Creighton*, 483 U.S. 635, 646-47 n. 6, 107 S.Ct. 303, 3042 n. 6, 97 L.Ed.2d 523 (1987).

As I read the Supreme Court's directives, once the trial judge determines that the plaintiff has asserted a clearly established right,

some discovery may well be appropriate before the judge rules on the qualified immunity defense. The majority's approach, however, slams shut this window for discovery through its unyielding application of the heightened pleading standard requiring direct proof of unconstitutional motives up front in the initial pleadings. Failure to provide any leeway for plaintiffs or trial judges, regardless of circumstances, to obtain evidence of illegal motives through limited discovery controlled by the trial judge is, in my view, not only unfair but unjustified by existing Supreme Court precedent.

III. APPLICATIONS TO THIS CASE

The trial judge here did not complete the prescribed qualified immunity analysis. He correctly determined that Siegert's right to a good faith evaluation by his supervisor was clearly established at the time, but he appears not to have considered whether Siegert's factual pleadings of Gilley's malicious motives met the heightened pleading standard. Consequently, his finding that Gilley's qualified immunity defense fails, *Siegert v. Gilley*, 692 F.Supp. 1406, 1418 (D.D.C.1988), must be vacated.

I believe, however, that Siegert's pleadings contained the necessary specificity to warrant limited discovery before a judicial resolution of the qualified immunity issue. Siegert's Affidavit states that Gilley had embarked on a course of making Siegert's professional life at St. Elizabeths Hospital unpleasant because he resented Siegert's lengthy medical leave and Siegert's resistance to Gilley's attempts to alter St. Elizabeths Hospital's behavior modification program. Affidavit of Frederick A. Siegert ("Siegert Affidavit") ¶¶ 4, 6, Joint Appendix ("J.A.") at 25. A reading of the Affidavit, together with Siegert's Amended Complaint, J.A. at 6, leaves little doubt that Siegert is claiming that because Gilley harbored these resentments, he maliciously wrote a highly derogatory reference letter. However inartfully, Siegert has done more than merely allege malice; he has provided some evidentiary basis for his contention that Gilley's motives were malicious and, by extension, unconstitutional. He has demonstrated with some plausibility that armed with sufficient evidence, he might defeat Gilley's claim to qualified immunity. Other circumstances set out in the pleadings lend some support to his theory: Siegert's history of excellent

ratings until Gilley became his supervisor, Siegert Affidavit ¶ 5, J.A. at 25, and the extreme language of the evaluation itself, Amended Complaint ¶ 11, J.A. at 8, which inherently casts doubt on the author's neutrality. The trial judge certainly had some basis for permitting a limited inquiry into motive.

Accordingly, I believe that a remand with instructions to allow Siegert limited discovery—indeed, discovery much along the lines that the trial judge already ordered, albeit for a merits determination—would be in order. If such circumscribed discovery, directed solely to Gilley's motives, were productive, Siegert could then amend his complaint to conform to the heightened pleading requirement. Without such an opportunity, I believe that Siegert has been denied the opportunity to vindicate his constitutional rights. I therefore respectfully dissent from the majority's outright dismissal of his case.

No. 88-5257

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988 C.A. No. 86-03234 Filed Jan. 9, 1989

Frederick A. Siegert, Ph.D.

v.

H. Melvyn Gilley, Ph.D.,

Appellant

BEFORE: Starr, Williams and Sentelle, Circuit Judges

ORDER

Upon consideration of appellee's motion to dismiss and appellant's opposition thereto, it is

ORDERED that the motion be denied. The district court conclusively resolved the claim of qualified immunity, and that order is immediately appealable. *See Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1986); *see also McSurely v. McClellan*, 697 F.2d 309, 316 (D.C. Cir. 1982).

Per Curiam

Civ. Action No. 86-3234.

United States District Court

FOR THE DISTRICT OF COLUMBIA

Frederick A. SIEGERT, Plaintiff,

v.

H. Melvyn GILLEY, Defendant.

June 30, 1988.

Psychologist brought action against his former government supervisor to recover for deprivation of due process liberty interest as result of supervisor's alleged defamation and to recover on state law claims of defamation, intentional infliction of emotional distress, and interference with contractual relations. The District Court, Sporkin, J., denied supervisor's motion for dismissal or summary judgment. Supervisor moved for reconsideration. The District Court held that (1) psychologist stated actionable deprivation of liberty interest as result of supervisor's alleged defamation after psychologist resigned from government employment, and (2) supervisor was not entitled to qualified immunity.

Motion denied.

1. Constitutional Law 278.4(3)

Allegations that defamation by psychologist's supervisor in prior employment at government hospital caused inability to obtain credentials for working with children as psychologist for United States Army, loss of employment at Army hospital, inability to obtain another government position as psychologist, and inability to practice profession adequately claimed stigma foreclosing freedom to take advantage of other employment opportunities and stated deprivation of liberty interest under due process clause; psychologist alleged more than mere harm to reputation. U.S.C.A. Const. Amends. 5, 14.

2. Civil Rights 13.8(1)

Former psychologist's liberty interest was clearly established when psychologist's supervisor during prior employment at government hospital allegedly defamed psychologist and caused inability to obtain credentials to work with children as United States Army psychologist, loss of employment with Army, and inability to obtain another government position as psychologist or to practice profession, and, thus, supervisor was not entitled to qualified immunity. U.S.C.A. Const. Amends. 5, 14; 42 U.S.C.A. §1983.

3. Constitutional Law 278.4(1)

Common-law defamation is transformed into constitutional deprivation of liberty under due process clause when government is source of defamatory allegations and resulting stigma involves some tangible change of status vis-a-vis government. U.S.C.A. Const. Amends. 5, 14.

4. Constitutional Law 278.4(1)

Fact that former psychologist possessed no property interest in original position at government hospital or in positions as psychologist for United States Army did not interfere with invocation of liberty interest under due process clause when government defamation caused loss of liberty and change in legal status. U.S.C.A. Const. Amends. 5, 14.

5. Constitutional Law 278.4(1)

Alleged defamation by former government supervisor causing loss of subsequent and future employment as psychologist did not need to occur in conjunction with resignation from government hospital, could occur incident to loss of subsequent employment as psychologist for United States Army, and, therefore, was actionable deprivation of liberty interest under due process; harm to reputation plus something else such as discharge or foreclosure of future opportunity was required to state actionable deprivation of liberty interest; and order in which they occurred was irrelevant. U.S.C.A. Const. Amends. 5, 14.

6. Constitutional Law 278.4(1)

Former government supervisor, who allegedly defamed psychologist after psychologist resigned from position at government hospital and obtained position as psychologist for United States Army could deprive psychologist of liberty interest under due process clause without denying him legal right; alleged defamation caused loss of job with Army and loss of professional standing. U.S.C.A. Const. Amends. 5, 14.

7. Constitutional Law 278.4(1)

Psychologist, who was allegedly deprived of liberty interest as result of former government supervisor's defamation, did not have substantially adequate remedy through comprehensive personnel scheme and was entitled to pursue remedy for violation of due process; defamation allegedly caused loss of position as psychologist for United States Army, loss of opportunity to work at another hospital, inability to obtain credentials, and harm to reputation in professional community. U.S.C.A. Const. Amends. 5, 14; 5 U.S.C.A. § 1101 et seq.

8. Federal Courts 15

Pendent jurisdiction over claims for defamation, intentional infliction of emotional distress, and interference with contractual relations was appropriate in action alleging deprivation of liberty interest under due process clause as result of defamation by former government supervisor. U.S.C.A. Const. Amends. 5, 14.

Nina Kraut, Washington, D.C., for plaintiff.

John M. Facciola, Asst. U.S. Atty., District of Columbia, Washington, D.C., for defendant.

MEMORANDUM OPINION
AND ORDER

SPORKIN, District Judge.

This case involves a claim by a clinical psychologist who was formerly employed at Saint Elizabeths Hospital and is now working as a librarian in Germany. Plaintiff claims that defendant deprived him of his due process rights and he has brought this action pursuant to the Fifth Amendment of the Constitution and the *Bivens* doctrine. He has also invoked the pendent jurisdiction of this court for his common law claims of defamation, intentional infliction of emotional distress and interference with contractual relations.

Plaintiff filed this lawsuit on November 25, 1986, slightly less than a year after he discovered allegedly defamatory communications between defendant and officials at his new place of employment had caused him to lose his new job. The theory of plaintiff's constitutional claim is that defendant's publication of defamatory remarks led not only to severe harm to his reputation but also caused an infringement of his "liberty interests" in violation of the protections provided by the due process clause of the Fifth Amendment to the United States Constitution. Plaintiff seeks damages under the principles first expounded in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

Defendant made a motion to dismiss the action, or in the alternative, for summary judgment, on several grounds, including the contention that even accepting his factual allegations, plaintiff had failed to show an infringement of any right protected by the Constitution. Defendant also asserted that the doctrines of qualified im-

munity and absolute immunity protect him against liability for any of plaintiff's claims. After hearing oral argument, I determined that because plaintiff had not obtained any discovery, the record was insufficiently developed to permit either dismissal or summary judgment. I found that a sharply circumscribed amount of discovery was warranted. Accordingly, I ordered the parties to take the testimony of the two principal actors in this affair—plaintiff, Dr. Siegert, and defendant, Dr. Gilley.

This case is now before me on defendant's Motion for Reconsideration and for a Stay of Discovery Pending Resolution of Defendant's Immunity Claim. Defendant urges me to reconsider my December 3, 1987 Order for a number of reasons. Defendant's core contention is that by ordering depositions before making a final determination on his motion for summary judgment:

> the Court, in a manner that is, we submit, contrary to the established method in this Circuit of resolving immunity claims in *Bivens* cases, ordered discovery which neither party sought in a case with undisputed facts. We respectfully submit that the Court clearly erred by conditioning the resolution of the defendant's motion for summary judgment, based on his immunity, on the parties's engaging in discovery when the fundamental facts bearing on Dr. Gilley's immunity were not in dispute.

Memorandum of Points and Authorities in Support of Defendant's Motion for Reconsideration and for a Stay of Discovery Pending Resolution of Defendant's Immunity Claim (hereinafter "Defendant's Brief for Reconsideration") at 5. After careful consideration of defendant's motion, I have determined, as I did before, that his motion to dismiss, or in the alternative, for summary judgment, must be denied at this time. Despite defendant's insistence that "the court must resolve the motion for summary judgment before permitting any discovery," I reiterate that I am willing to hear renewed motions for summary judgment by either party after the completion of discovery.

THE FACTS

For the purposes of defendant's motion, the truth of the allegations in the complaint and plaintiff's supporting materials must be taken as true, and any ambiguities or uncertainties concerning the sufficiency of the claim must be resolved in favor of the plaintiff. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *Paul v. Davis*, 424 U.S. 693, 720, 96 S.Ct. 1155, 1169-1170, 47 L.Ed.2d 405 (Brennan, J. dissenting); *Walker Process Equipment Inc., v. Food, Machinery & Chemical Corp.*, 382 U.S. 172, 174-175, 86 S.Ct. 347, 348-349, 15 L.Ed.2d 247 (1965); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957); *Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1102 (D.C.Cir.1985); *Sinclair v. Kliendienst*, 711 F.2d 291, 293 (D.C.Cir. 1983). Although the defendant has labelled his motion one either for summary judgment or to dismiss, he has not put into evidence any affidavits which would contradict the substantive facts set forth by plaintiff.[1] I must therefore treat the facts alleged by plaintiff as admitted, as I would on a motion to dismiss. As the Supreme Court has asserted, "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 456, 78 S.Ct. at 101-102; *Hughes v. Rowe*, 449 U.S. 5, 10, 101 S.Ct. 173, 176, 66 L.Ed.2d 163 (1980).

The following allegations by plaintiff therefore must be accepted as the relevant facts for purposes of this motion:

According to plaintiff, he was employed as a clinical psychologist at St. Elizabeths Hospital, Washington, D.C. ("St. E's"), for approximately six years prior to his resignation on October 1, 1985. Defendant was plaintiff's immediate supervisor at St. E's for the year immediately preceding plaintiff's departure from St. E's.

[1] Plaintiff has placed into evidence his own affidavit, which relates the facts recounted below. Defendant has placed into evidence an affidavit by Dr. Eugene Stammeyer, the Director of Psychology at St. Elizabeths Hospital. Dr. Stammeyer's affidavit is largely devoted to explaining the process whereby Dr. Gilley was asked to respond to the inquiry about Dr. Siegert's credentials. Aside from a brief reference to the circumstances under which Dr. Siegert departed from St. E's, Dr. Stammeyer does not address the truth or falsity of Dr. Gilley's letter.

Plaintiff resigned from St. E's mainly because of long-standing personal and professional differences with defendant. Prior to his professional relationship with the defendant, plaintiff received exemplary job performance ratings from his supervisors.

In early September, 1985, plaintiff received advanced notice from St. E's that he was going to be terminated from his position at the Hospital. The termination was due, at least in part, to plaintiff's conflicts with the defendant. In September, plaintiff met with officials at the Hospital and reached an agreement that if he resigned from his position, a letter of removal would not appear in his personnel file. In reaching such an agreement, plaintiff sought to protect his future job prospects and his good standing in his professional community. On October 1, 1985, pursuant to the agreement, plaintiff resigned from his position at St. E's.

Concurrent with his removal/resignation from St. E's, plaintiff was in the process of obtaining a position as a clinical psychologist at the United States Army Medical Department Activity ("USAMDA") in Bremerhaven, West Germany. He was seeking a position for personal reasons – he wanted to re-join a woman with whom he had a relationship and who lived there.

On or about August 30, 1985, plaintiff entered into a 36 month contract with USAMDA to work as a clinical psychologist in the Exceptional Family Member Program in Bremerhaven. His duties were to consist primarily of working with children on an out-patient basis. He also would work with members of the children's families. Plaintiff had considerable experience working with children in the past, both at St. E's and in other former positions. Working with children is plaintiff's area of specialty and expertise and he has trained other counselors in areas relating to child development and behavior therapy.

A condition of plaintiff's employment with the Department of the Army is that he be "credentialed" as to the treatment of children and, independently, as to the treatment of adults. Although the record is neither clear nor developed as to the actual meaning of "being credentialed" in the profession of psychology, it appears that a psychologist must be credentialed for certain professional activities by any given hospital before he or she can be permitted

to practice in those areas.[2] In this case, pursuant to both the common practices of the profession, and specific Army regulations, plaintiff could only work professionally with children at USAMDA in Bremerhaven *after* he received his credentials from the Hospital there for working with children. The same was true for working with adults.

Plaintiff was credentialed to work with both children and adults at St. E's. Because he had been credentialed at his former hospital and because of his extensive experience and expertise in working with children, plaintiff expected that he would obtain his credentials in Bremerhaven without any difficulty.

In mid-October, 1985, William R. Smith, Jr., LTC, MC, Deputy Commander for Clinical Services and Chairperson of the Credentials Committee at the USAMDA, contacted St. E's to obtain credentials information about plaintiff. He spoke with defendant, Dr. Gilley. The content of their discussion would appear to be quite important. Although we do not know what was said, the conversation was followed by a letter, on October 23, 1985, which according to plaintiff, made totally false and unsubstantiated allegations about the plaintiff. This letter has been submitted under seal by defendant. I have examined the letter *in camera*. While I am not lifting the seal at this time, if the plaintiff is correct that the statements contained in the letter are false and misleading, they

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[2] According to plaintiff, who in turn is relying on the opinion of Dr. Russell Newman, the Director of Legal and Regulatory Affairs for the Practice Directorate of the American Psychological Association:

> "credentialing" is synonymous to "privileges" that are granted by a hospital's own medical staff or board. For example, if a person has a particular specialty, he or she is granted particular privileges in conformity with that specialty's standards or criteria for practice which have been established by the hospital's board, such as educational standards, years of practice and type and quality of supervision received. Once granted, "some element" of due process has to be adhered to by the board ... if the credentials are to be later revoked.

Plaintiff's Opposition to Defendant's Motion for Reconsideration and for a Stay of Discovery Pending Resolution of Defendant's Immunity Claim (hereinafter "Plaintiff's Opposition") at 2, n. 2.

would tend to give rise to a cause of action as plaintiff contends. In the letter, Dr. Gilley accuses the defendant of being inept, unethical, and untrustworthy among other things. Plaintiff claims these accusations are untrue and are totally inconsistent with the fact that he received exemplary job performance ratings from his superiors for five years. It is clear that at some point in this case, the substance of the letter and plaintiff's employment record will have to be reconciled.

According to plaintiff, as a result of the information provided to Colonel Smith by defendant, plaintiff was denied his credentials by USAMDA for working with children. Plaintiff was informed by Colonel Smith that the reports they received about him from St. E's were "extremely unfavorable" and that the Credentials Committee therefore recommended that he not be credentialed. The decision to deny plaintiff his credentials was appealed by plaintiff. Plaintiff recently learned that his appeal had been denied. *See* Plaintiff's Opposition to Defendant's Motion for Reconsideration and for a Stay of Discovery Pending Resolution of Defendant's Immunity Claim (hereinafter Plaintiff's Opposition") at 2, n. 1.

Because of the difficulty in obtaining credentials that he was experiencing at the hospital in Bremerhaven, plaintiff applied in the Summer of 1986 for a psychologist position at an Army base in Stuttgart. He obtained a position and reported for work on July 28, 1986. He "was literally turned away and was told that [he] was not wanted because of what they had heard about me from Bremerhaven personnel." *See* Siegert Affidavit at 5.

In September, 1986, plaintiff's credentials as to both adults and children were provisionally granted. Shortly thereafter, however, his credentials for treating children were revoked and he was involuntarily released from employment. Plaintiff brought this suit in November, 1986. Plaintiff was assigned to work in the medical library of the Army hospital at Bremerhaven until the resolution of several pending appeals of credentialing decisions. During the pendency of those appeals and this lawsuit, plaintiff "has been unable to find even remotely comparable employment." Plaintiff's Opposition at 2, n. 1.

ANALYSIS

Plaintiff's basis for bringing suit in this federal court is his *Bivens* claim that Dr. Gilley's publication of defamatory information through both a letter and a telephone call to his new employers deprived him of a constitutionally protected liberty interest. The other four counts in plaintiff's complaint merely state common law claims which are only appropriate for adjudication in this court if they are pendent to a surviving federal claim. *See generally United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966) ("Certainly if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.").

Defendant contends that "the facts set out in plaintiff's complaint establish an allegation of only the common law tort of defamation, and do not properly allege a violation of his constitutional rights pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)." Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss or for Summary Judgment (hereinafter "Defendant's Brief") at 4. Defendant also contends that even if plaintiff has properly alleged a constitutional *Bivens* action, Dr. Gilley is clothed with qualified immunity which shields him from liability unless his conduct violated the standards laid down in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Closely related threshold inquiries are involved in determining whether plaintiff has made out an acceptable *Bivens* claim and whether defendant's qualified immunity requires dismissal of that claim. On the facts presented in this case, if plaintiff satisfies the *Harlow* standard he will necessarily make out a colorable *Bivens* claim. I therefore turn directly to the issue of qualified immunity.

Justice Powell, writing for the majority in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), set forth the standard for qualified immunity when he stated:

> . . . government officials performing discretionary functions generally are shielded from liability for civil

> damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. 102 S.Ct. at 2738. Hence, when faced with either a motion to dismiss or a motion for summary judgment which rests upon a claim of qualified immunity, I must:

> determine not only the currently applicable law, but whether the law was clearly established at the time the action occurred. *Harlow v. Fitzgerald*, 102 S.Ct. at 2738 (footnote omitted). If the law was not clearly established, the defendant will prevail on summary judgment on the basis of the qualified immunity defense, *id.* [457 U.S.] at 821 [102 S.Ct. at 2739-2740] (Brennan, J. concurring). If, on the other hand, the applicable law was clearly established, then, as the Court noted in *Harlow*, it should have been known to "a reasonably competent public official," and the qualified immunity defense "should ordinarily fail" unless the defendant "claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard."

Czurlanis v. Albanese, 721 F.2d 98, 108 (3d Cir.1983) (quoting *Harlow*).[3] As the Supreme Court recently asserted, "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action," *Anderson v. Creighon*, ___U.S.___, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987) (quoting *Harlow*), "assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.*

The Supreme Court also has provided recent guidance in applying the *Harlow* standard to specific facts and legal rules. The Court instructs:

> The operation of [the *Harlow*] standard, however, depends substantially upon the level of generality at

[3] As defendant points out, "until this threshold immunity question is resolved, discovery should not be allowed." *Harlow v. Fitzgerald*, 457 U.S. 800, 817, 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396 (1982).

> which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow* ... The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Anderson v. Creighton, ___U.S.___, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 523 (1987); *see also Martin v. Malhoyt*, 830 F.2d 237, 253 (D.C.Cir.1987). The Court of Appeals for the District of Columbia has provided the further guidance that:

> Consistent with the *Anderson v. Creighton* Court's emphasis on the "particularized" manner in which the immunity inquiry is to be undertaken, "we subject damage actions against government officials to a heightened pleading standard," *Smith v. Nixon*, 807 F.2d 197, 200 (D.C. Cir.1986), wherein plaintiffs must, at the very least, specify the "clearly established" rights they allege to have been violated with "sufficient[ ] precis[ion] to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds." *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir.1984).

Martin, supra, 830 F.2d at 253 (D.C. Cir. 1987); *see also Ellsberg v. Mitchell*, 807 F.2d 204 (D.C.Cir.1986); *Halperin v. Kissinger*, 807 F.2d 180 (D.C.Cir.1986).

However, despite the Supreme Court's instruction that lower courts focus on the contours of the right as applied to the specific facts in a given case, and the Circuit Court's requirement that a

heightened pleading standard be applied in the context of a qualified immunity inquiry, the Supreme Court has also emphasized that "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Anderson v. Creighton*, 107 S.Ct. at 3039; *Mitchell v. Forsyth*, 472 U.S. 511, 535, n. 12, 105 S.Ct. 2806, 2820, n. 12, 86 L.Ed.2d 411(1985). Finally, when scrutinizing a claim against the *Harlow* standard, it must be kept in mind that when government officials violate the law, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow, supra*, 457 U.S. at 814, 102 S.Ct. at 2736.

[1, 2] In this case, the threshold immunity question is whether it was clearly established in late 1985 that plaintiff had a liberty interest of which defendant deprived him. Stated in more specific terms, I must determine whether Dr. Siegert's loss of employment at the Bremerhaven hospital and his inability to obtain his credentials as a result of the allegedly defamatory communications made by defendant involves the violation of a concrete, specific "liberty interest" within the protection of the due process clause of the Fifth Amendment.[4] A careful review of the case law leaves little question that plaintiff's clearly established constitutional rights were violated by defendant's conduct. Defendant's contentions to the contrary are based both on a refusal to accept as true the facts alleged by plaintiff,[5] and an inappropriately narrow

[4] The same standard for determining deprivations of liberty without due process of law applies under the Fifth and the Fourteenth Amendments. *See Paul v. Davis*, 424 U.S. 693, 702, n. 3, 96 S.Ct. 1155, 1161, n. 3, 47 L.Ed.2d 405 ("If ... defamation by a state official is actionable under the Fourteenth Amendment, it would of course follow that defamation by a federal official should likewise be actionable under the cognate Due Process Clause of the Fifth Amendment."); *see also Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1105, n. 13 (1985).

[5] For instance, defendant asserts that "plaintiff's constitutional tort action must be dismissed because plaintiff cannot possibly establish that at the time Dr. Gilley wrote the letter the law was clearly established that writing a letter about a former employee to his prospective employer which is allegedly defamatory in response to the former employee's request that his new employer be provided with all information about the employee's job performance subjects the former employee to a deprivation of his liberty without due process of law." *See* Defendant's Supplemental Memorandum at 5. Defendant's sharply slanted characterization of the facts and distortion of the nature of the constitutional right at issue in his case is useless for purposes of considering plaintiff's motion to dismiss. Although plaintiff must meet a heightened pleading standard, he still retains the discretion to choose the constitutional right which he contends has been violated.

understanding of the breadth of plaintiff's constitutional liberty interests as recognized by the D.C. Circuit in 1985.

Defendant contends that this case is controlled by *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) and *Mosrie v. Barry*, 718 F.2d 1151 (D.C.Cir.1983).[6] The facts in this case, however, are readily distinguishable from the facts in those cases. The events set forth by plaintiff in this case are much more similar to the underlying facts in *Doe v. United States Dept. of Justice*, 753 F.2d 1092 (D.C. Cir. 1985) (finding violation of constitutionally protected liberty interests of attorney discharged by Department of Justice amidst charges of dishonesty) and *Bartel v. F.A.A.*, 725 F.2d 1403 (D.C. Cir.1985) *on remand* 617 F.Supp. 190 (D.D.C.1985).

In *Paul v. Davis*, plaintiff was arrested for shoplifting and local police chiefs posted him as an "active shoplifter" in a flyer circulated to hundreds of merchants. After the charges against him were dropped, plaintiff sued the police for violation of his constitutional rights under 42 U.S.C. § 1983. The plaintiff in *Paul* was neither a government employee nor an applicant for a government job. His sole claim for relief was for harm to his reputation. The Supreme Court characterized the question presented in *Paul* as "whether respondent's charge that petitioner's defamation of him, standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U.S.C. § 1983

[6] Defendant, for instance, asserts that: "The decisions in *Paul v. Davis, supra* and the cases that follow it are clearly dispositive of plaintiff's attempt to allege a constitutional violation in the present case. Acts by government officials which are claimed to harm a person's reputation and his future earning capacity do not constitute a violation of any right protected by the Constitution." Defendant's Brief at 6. Of course, as discussed above, plaintiff has alleged significantly more than merely harm to reputation and resultant harm to future earning capacity. He has set forth specific government jobs which he has lost and he has alleged the foreclosure of the opportunity to obtain government positions in his profession in the future.

and the Fourteenth Amendment." 424 U.S. at 694, 96 S.Ct. at 1157. The Court concluded that it did not and held that defamation alone is not enough to give rise to a due process right; "other governmental action" is required.[7] The Court, well aware of the "frequently drastic effect of the 'stigma' which may result from defamation by the government," *id.* 424 U.S. at 701, 96 S.Ct. at 1160-1161, held that proof of damages does not meet that requirement.

Rather, the *Paul* Court required some tangible alteration of "status" in addition to an injury in reputation to make out a cognizable liberty interest. This requirement has become popularly known as the "reputation plus" standard. See *Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1107 (D.C.Cir.1985). Whereas the plaintiff in *Paul* failed to allege any harm to specific employment opportunities, Dr. Siegert has alleged both the loss of a specific position (Bremerhaven) and the denial of another specific opportunity for governmental employment (Stuttgart). Dr. Siegert, moreover, has alleged a permanent change in status due to his inability to obtain credentials to work with children. Because of that change in status, he "was wrongfully denied the right to be considered for government [employment] in common with all other persons." *Mosrie*, 718 F.2d at 1161. Plaintiff, a career psychologist, who is presently working as a librarian, has alleged that he may never be able to obtain another government position as a psychologist and that his ability to practice his profession has been destroyed. Accepting these allegations as true, defendant's actions have undoubtedly imposed a "stigma" on Dr. Siegert that has foreclosed his freedom to take advantage of other employment opportunities. See *Board of Regent v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972). Unlike the plaintiff in *Paul*, Dr. Siegert has alleged much more than "mere" harm to reputation. *Paul* is therefore inapposite.

[7] Similarly, Judge Bork pointed out in *Mosrie v. Barry*, 718 F.2d 1151, 1158 (D.C.Cir.1983) that, "Indeed, in explaining that harm to reputation is not a deprivation of liberty, the Court [in *Paul v. Davis*] quoted Justice Reed from *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951): the defamation may be 'hurtful to [the plaintiffs'] prestige, reputation and *earning power*' but nonetheless does not deprive them of a fifth amendment liberty interest."

Defendant's reliance on *Mosrie v. Barr*, 718 F.2d 1151 (D.C.Cir.1983) and *Shewmaker v. Minchew*, 504 F.Supp. 156 (D.D.C. 1980), *aff'd* 666 F.2d 616 (D.C.Cir.1981) is similarly misplaced. In *Mosrie*, the D.C. Circuit narrowly held that an individual cannot claim a violation of his or her constitutional rights when he or she is merely laterally transferred:

> The harms suffered by appellant in this case do not meet the *Paul v. Davis* requirement of loss of a government position or change in legal status. Appellant was merely transferred laterally . . . To find the lateral transfer a deprivation would be inconsistent with *Paul v. Davis's* repeated emphasis on "loss of government employment."

Mosrie, 718 F.2d at 1161. Because the *Mosrie* plaintiff's "management responsibilities, duties and promotional potential after his transfer [were] comparable to those before" the transfer, *Mosrie* is easily distinguishable from this case. Similarly, in *Shewmaker*, the plaintiff was first demoted, but was subsequently reinstated, by a successful administrative challenge, to his original position. Dr. Siegert, obviously, has not been reinstated. Both *Mosrie* and *Shewmaker* involved situations where the government injured the plaintiff's reputation, but in so doing, failed to effect "a removal, extinguishment, or significant alteration of an interest recognized and protected by ... law." *Mosrie*, 718 F.2d at 1160-61. Unlike Dr. Siegert, neither the plaintiff in *Mosrie* nor the plaintiff in *Shewmaker* lost their job. Moreover, neither lost what amounts to their right to continue practicing their profession.

Although *Paul* and *Mosrie* do not control the outcome of this case, those cases make it clear that in order for plaintiff to establish that the government has deprived him of a constitutionally protected liberty interest, he must "demonstrate that the government's defamation resulted in a harm to some interest beyond reputation." *Doe v. United States Dept. of Justice*, 758 F.2d 1092, 1111 (D.C.Cir.1985). According to the D.C. Circuit's decisions in *Doe* and *F.A.A. v. Bartel*, 725 F.2d 1403 (D.C.Cir.1984), both of which were decided prior to the occurrence of the events at issue in this case, "[l]oss of present or future

employment, however, satisfies that required additional interest." *Doe*, 758 F.2d at 1111. In this case, Dr. Siegert meets that requirement because he lost both his present job (Bremerhaven) and a specific future job (Stuttgart) because of defendant's defamation.

Doe involved an action brought by a former Department of Justice (DOJ) attorney against the Department and various DOJ officials. The plaintiff was discharged from her position as a DOJ attorney amidst charges of unprofessional conduct and dishonesty. After unsuccessfully seeking an administrative name-clearing hearing, the plaintiff sued in federal court, seeking reinstatement, back pay and other appropriate relief from the Department; she sought money damages from the individual defendants. *Doe*, 753 F.2d at 1095. Although the D.C. Circuit affirmed the dismissal of plaintiff's *Bivens* action against the individual DOJ defendants on statute of limitations grounds, *Id.* 753 F.2d at 1114-15, the court found that she had asserted a constitutionally protected liberty interest against the Department. *Doe*, 753 F.2d 1102-1114. Government action had both caused plaintiff to lose her job and placed a "stigma" on her. The court found her liberty interests had therefore been violated.

In reaching that conclusion, the D.C. Circuit articulated a number of principles which bear directly on whether or not Dr. Siegert has set forth a constitutionally protected liberty interest. First of all, the *Doe* court found that government defamation accompanied by the loss of government employment would support a liberty interest claim. The court stated:

> *Paul* explicitly recognized that the *combination* of government defamation plus the failure to rehire or the discharge of a government employee states a liberty interest claim even if the discharge itself deprives the employee of no property interest protected by the fifth or fourteenth amendments . . . "it is the individual's status as a government employee and not his property interest in continued employment which furnishes the 'plus' that raises reputation to the level of a constitutionally protected liberty interest."

Doe, 753 F.2d at 1106-07 (citations omitted) (emphasis added). In addition, the *Doe* court went to great lengths to make it clear that Doe, who like the plaintiff in *Roth* was not a "protected" government employee, need not enjoy "protected status" in continued government employment in order to state a liberty interest claim. Rather, the court emphasized that, "a discharge from government employment satisfies *Paul*'s 'reputation plus' requirement *regardless* of whether the employee can point to any independent property interest in continued employment." *Doe*, 753 F.2d at 1109 (emphasis added).

[3, 4] Therefore, a common law defamation is transformed into a constitutional deprivation of liberty when the government is the source of the defamatory allegations and the resulting "stigma" involves "some tangible change of status vis-a-vis the government." *Doe*, 753 F.2d at 1108-09. Under *Doe*, the fact that Dr. Siegert may have possessed no *Roth* property interest in either his original position at St. E's or in his positions in Germany does not interfere with his invocation of a liberty interest when government defamation causes his loss of employment and a change in his legal status.

A little less than two years before the events in this case occurred, the D.C. Circuit, in *Bartel v. F.A.A.*, 725 F.2d 140 (D.C.Cir.1984), addressed a factual situation which closely parallels the facts in this case and which foreshadowed the principles enunciated in *Doe*. In that case, Bartel, an air safety inspector for the Eastern Region of the FAA, was accused of certain Privacy Act violations. After an investigation, Brian Vincent, the Chief of the FAA Eastern Region Flight Standards Division, decided that a letter of reprimand to Bartel was appropriate. No such letter was ever issued, however, because Bartel left the FAA for employment elsewhere before the adverse action became official. Slightly less than a year after his departure, Bartel applied for a job with the Southern Region of the FAA. When Vincent learned that Bartel was seeking a position with the Southern Region, he wrote an allegedly defamatory letter about Bartel and the Privacy Act accusations to several FAA inspectors. These letters came to the attention of the hiring officials considering Bartel's candidacy. Although he was determined to be "a best qualified candidate," Bartel was not

selected for the position at the FAA. Bartel was later hired by the FAA for a temporary GS-12 position, despite the fact that he was qualified for a permanent GS-13 position that was open at the same time.

Bartel sued Vincent in his personal capacity, alleging that "Vincent's actions defamed him and resulted in the denial of his right to consideration for reemployment at the GS-13 position on an equal basis with others of equivalent skill and experience." *See Bartel*, 725 F.2d at 1415, 617 F.Supp. at 195. The D.C. Circuit found that Bartel "was wrongfully denied the 'right to be considered for government [employment] in common with all other persons."' *Bartel*, 725 F.2d at 1415 (quoting *Mosrie*, 718 F.2d at 1161). According to the D.C. Circuit, "the refusal of the FAA, Southern Division to hire Bartel for the same reasons despite his 'best qualified' rating may itself have effectively extinguished a legally recognized and protected interest." *Bartel*, 725 F.2d at 1415. On remand, the district court held that Bartel had "identified a cognizable liberty interest the denial of which would constitute a due process violation." *Bartel*, 617 F.Supp. at 195. It further held that, "[l]oss of future or present government employment satisfies" the requirement under *Paul* that the plaintiff "demonstrate that the government's defamation resulted in a harm to some interest beyond reputation." *Id.* 617 F.Supp. at 195 (citing *Paul*, *Mosrie* and *Doe*).

The facts in this case are remarkably similar to the facts in Bartel. Both cases involve an allegation by a former government employee that government defamation caused the foreclosure of an opportunity to obtain a specific future government position. Neither case involves a discharge or termination from the former government employee's position— both involve "voluntary" departure to avoid the threat of punitive action. There can be little question that if Bartel possessed a liberty interest in seeking the government position at the FAA, then Dr. Siegert possessed a liberty interest in his job at the hospital in Bremerhaven. In fact, Dr. Siegert, if anything, was deprived of substantially "more" of his liberty interest than was Bartel—Dr. Siegert lost not one, but two positions (Bremerhaven and Stuttgart) for which he had already been hired. Moreover, he lost his credentials and he has not been able to obtain another position.

[5] The case law prevailing at the time of the events in question, therefore, plainly provides that defendant's actions violated Dr. Siegert's constitutionally protected liberty interests. Despite the clarity of that case law, defendant urges two separate, but related, narrow constructions of the case law. Both must be rejected as being inconsistent with the holdings in *Doe* and *Bartel*. Defendant asserts that:

> ... a defamation by a government official does not constitute the violation of a liberty interest, protected by the due process clause, unless the person defamed can establish that the defamation accompanied a "loss of government position or a change in legal status." (*Mosrie*). Therefore, to prevail a plaintiff must establish that the defamation was uttered incident to his discharge or incident to an alteration of his legal status, resulting in his loss of some entitlement protected from governmental deprivation by state or federal law.

Relying on that passage, defendant contends that because defendant did not defame Dr. Siegert "incident to his discharge" or to a change in his legal status, there was no violation of plaintiff's liberty interest. In other words, because defendant's defamation of plaintiff allegedly did not occur in conjunction with his discharge/resignation from St. E's, but rather occurred incident to his loss of employment in Germany, plaintiff's liberty interests were not violated.[8] Under this theory, presumably, no matter what defendant said or wrote about plaintiff *after* he had either left his original job or been discharged, plaintiff would not have recourse to a *Bivens* action. Of course, this reasoning wholly ignores the plain reality that defendant's alleged defamation of Dr. Siegert *caused* his discharge from Bremerhaven and foreclosed his employment opportunity in Stuttgart and most likely elsewhere.

---

[8] Defendant's description of the factual scenario also glosses over the fact that Dr. Gilley sent the allegedly defamatory letter only 23 days after Dr. Siegert resigned from his position at St. E's under the threat of removal.

Furthermore, this excessively narrow restatement of the dictum excerpted from *Mosrie* finds no support in the case law. Defendant's view of the law runs directly counter to the D.C. Circuit's square holding in *Bartel* that an individual may have a liberty interest in future government employment. *See supra*. Furthermore, as the D.C. Circuit stated in *Doe*, "*an overwhelming majority* of the circuits have explicitly concluded that a non-tenured, at will government employee states a liberty interest claim after *Paul* when discharged *or foreclosed from future government employment amidst stigmatizing allegations by the government.*" *Doe*, 753 F.2d at 1110, n. 18 (collecting cases) (emphasis added). *See also Conset Corp. v. Community Services Administration*, 655 F.2d 1291 (D.C.Cir.1981) (due process guarantees apply to memorandum calling into question integrity, honesty or business reputation where it effectively denies contractor all *future* government contract work). Either discharge or foreclosure of a future opportunity satisfies the *Paul* requirement for more than mere defamation. All that is necessary is "harm to reputation plus"— the order in which they occur is irrelevant. The two events merely must be closely connected.

Dr. Gilley's letter satisfies this "connectedness" standard. The letter not only was sent incident to his discharge, but *caused* plaintiff's loss of two job in Germany and the alteration of his legal status in the form of his loss of his credentials. There can be no doubt that the defamation by defendant accompanied "a loss of government position or change in legal status." *Mosrie*, 718 F.2d at 1161-62. There is nothing in the case law to support defendant's implied contention that plaintiff's loss of his government position or the alteration in legal status must *precede* the defamation.[9] Such a reading of the cases would simply stand *Paul* and its progeny on their head.

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[9] Defendant relies on the following passage from *Mosrie*:

> For a defamation to give rise to a right to procedural due process, it is necessary—we need not say when it is sufficient—that the defamation be accompanied by a discharge from government employment or at least a demotion in rank and pay.

Mosrie, 718 F.2d at 1162. Nothing in that passage implies that the defamation must be preceded by the discharge or demotion.

[6] Defendant further contends that for plaintiff to have a constitutionally protected liberty interest, the same government officials that defame him must also deny him a legal right. Because defendant in this case claims he has not done anything to directly harm the plaintiff beyond sending the allegedly defamatory letter, he argues he has not caused the plaintiff the deprivation of a liberty interest. Defendant relies on the following dictum from *Mosrie* to support his argument:

> The reaction of others to unfavorable publicity about a person is not, within the meaning of *Paul v. Davis*, a change in legal status imposed by the government ... Financial loss and loss of some employment opportunities do not, therefore, amount to an alteration of a legal right. That must be so even if some of the job opportunities lost are for public jobs .. .

Mosrie, 718 F.2d at 1162. In short, defendant contends that there is no *Bivens* action in this case because, neither "the defendant [n]or St. Elizabeths Hospital has taken an action, in addition to the defamatory letter, to bar the plaintiff's ability to seek employment." Defendant's Reply at 8.

Defendant misreads the language in *Mosrie*. What *Mosrie* and *Paul* preclude from the zone of constitutionally protected liberty interests is mere defamation without an attendant loss of a specific government job or an alteration in legal status. What is at issue in this case is not merely "the reaction of others to unfavorable publicity." *Mosrie*, 718 F.2d at 1162. Rather, defendant, a government official, allegedly took deliberate action, (after plaintiff resigned from St. E's), to bar the plaintiff from obtaining the position he was seeking in Germany. Granted, the reaction of third parties to defendant's allegedly defamatory letter was a necessary step in Dr. Siegert's ultimate denial of the positions in Germany. The fact that Dr. Gilley had to work through others to accomplish his goals, however, does not relieve Dr. Gilley from full responsibility for the natural and expected outcome of his actions. From Dr. Siegert's perspective, it is obviously irrelevant that third parties participated in the process whereby he lost his new position. What matters to him is that Dr. Gilley allegedly defamed him, and as a

direct and proximate result of that defamation, he lost his job and his professional standing. In addition, he has been unable to obtain another position in his profession.

When the *Harlow* Court redefined the qualified immunity defense it provided an additional basis for defendant to retain his qualified immunity *even if* his actions violated clearly established statutory or constitutional rights. According to the Court:

> If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

Harlow, 457 U.S. at 818-819, 102 S.Ct. at 2738-2739. *See also Anderson v. Creighton*, 107 S.Ct. 3034, 3038 (1987) (qualified immunity shields government officials "from civil damages liability as long as their actions could reasonably be thought consistent with the rights they are alleged to have violated"); *Davis v. Scherer*, 468 U.S. 183, 191, 104 S.Ct. 3012, 3017, 82 L.Ed. 2d 139 ("Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard.").

In this case, the defendant does not argue that any exceptional circumstances exist to demonstrate that he reasonably neither knew nor should have known that his actions were violating plaintiff's constitutionally protected right to liberty. Indeed, his alleged actions may constitute the uttering of a false statement in contravention of 18 U.S.C. § 1001.[10] His qualified immunity

[10] 18 U.S.C. § 1001 provides:

> Whoever in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

defense therefore fails and my inquiry is completed by my determination that the applicable law was well established. *See Hobson v. Wilson*, 737 F.2d 1, 27 (D.C.Cir. 1984).

Our inquiry does not end with the identification of a violation of a clearly established constitutional right and the stripping away of defendant's qualified immunity. Deprivation of a liberty interest is cognizable as a violation of the Fifth Amendment only when it is done without due process of law. Here, of course, Dr. Gilley's actions against Dr. Siegert were taken without any process whatsoever. There can be no question that if his allegations are true, plaintiff has been denied due process of law.

[7] Defendant contends, however, that plaintiff "has received *or will receive* all the process that is due him" (emphasis added). He argues that the remedies available to plaintiff under the administrative scheme established by the Civil Service Reform Act of 1978, "preempt a constitutional claim for damages predicated on conduct remediable under that scheme." Defendant's Brief at 10. *See also Bush v. Lucas*, 462 U.S. 367, 387, 103 S.Ct. 2404, 2416, 76 L.Ed.2d 648 (1983). Indeed, defendant identifies several administrative forums where plaintiff might proceed to have his various harms remedied.

It is, however, premature to consider defendant's arguments about the alternative remedies available to plaintiff. Before me are very serious allegations of a deprivation of constitutional rights without due process of law. I must accept these allegations as true for purposes of deciding this motion. In addition, the adverse consequences that befell plaintiff are serious. Dr. Siegert has identified four distinct, but related harms he has suffered as a result of Dr. Gilley's alleged actions: (1) he lost a position he had already obtained in the Bremerhaven hospital; (2) he was foreclosed from an opportunity to work at the hospital in Stuttgart; (3) he was refused credentials at both hospitals and fears being denied credentials elsewhere; concomitantly he has been unable to find "either remotely comparable employment here or abroad." Plaintiff's Op-

position to Reconsideration at 2, n. 2; and (4) his reputation in his professional community was harmed. In addition, of course, he has alleged emotional distress and loss of income because of his inability to obtain a position in his profession. Finally, plaintiff is deeply concerned that unless his record is corrected and measures taken to prevent a repetition of the actions taken against him in this case, these event will haunt him for the rest of his life.

Under these circumstances, I would be trivializing very valuable protections from which this plaintiff is entitled to benefit were I to force this plaintiff to seek relief in another forum. There is no requirement in the law for me to relegate this plaintiff to an administrative forum, if one actually exists, at this early stage of this litigation.

As a result, I find that for this plaintiff there is not available the "substantially adequate remedy through [a] comprehensive federal personnel scheme" which under *Bush* would preclude the implication of a *Bivens* remedy. *Bartel v. F.A.A.*, 617 F.Supp. 190 (D.D.C.1985); *Bush v. Lucas*, 462 U.S. 367, 387-390, 103 S.Ct. 2404, 2416-2418, 76 L.Ed.2d 648 (1983). The process which is due plaintiff must come from this court.

[8] In addition, since I am retaining jurisdiction over plaintiff's *Bivens* claim, it is appropriate for me to exercise pendent jurisdiction over plaintiff's state law claims. These state law claims state separate but parallel grounds for the relief sought in the *Bivens* claim. *See generally United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Many of the operative facts which give rise to Dr. Siegert's constitutional claim against Dr. Gilley are the same as those upon which Dr. Siegert's state law claims rest. Furthermore, the constitutional claim, as discussed above, is a serious one and is not a mere "appendage" to state law claims which comprise "the real body of the case." *Id.* 383 U.S. at 727, 86 S.Ct. at 1139. *See also Bartel v. F.A.A.*, 725 F.2d 1403, 1405, n. 2 (D.C.Cir.1984). Therefore, it is appropriate to hear this entire case in federal court.

In light of my holding regarding defendant's assertion of qualified immunity, I need not address defendant's motion for summary judgment on the basis of his alleged absolute immunity

from common law tort claims until after discovery is complete. Because the common law claims closely parallel plaintiff's *Bivens* claim, permitting the common law claims to go forward at least until the completion of discovery should not impose any additional burdens on defendant.

Although I have denied defendant's motion to dismiss and his motion for summary judgment and have rejected his qualified immunity defense, I must emphasize that I have reached no conclusions as to the merits of this case. This Opinion has been based on well pleaded allegations which, although they were subjected to heightened scrutiny, were accepted as true. These allegations may well prove to be unsubstantiated and this case may well fail. I reluctantly wrote this Opinion because of counsel for the defendant's insistence that I had no right to establish a limited discovery schedule prior to issuing an opinion on the qualified immunity defense.

Obviously, in a case of this sort, knowing the facts is essential to determining the merits. If the information supplied by defendant is true, and the plaintiff is plainly incompetent and derelict, the plaintiff must bear the cross. Furthermore, the defendant must be protected in providing such information if he acted in good faith. To foster the objective of a free exchange of truthful information, however, an individual need not be permitted to intentionally or maliciously provide false information. This defendant should not be permitted to hide behind the laudable public policy of promoting candor in job references. In addition to candor, both the subject and the recipient of information about a potential employee deserve accuracy and truthfulness. Those important values need not be sacrificed to maximize the quantity of information exchanged.

For the foregoing reasons, and upon consideration of the entire record herein, defendant's motion for reconsideration is hereby DENIED and it is

ORDERED that in light of this Opinion, the parties shall proceed to conduct discovery.

Civ. Action No. 86-3234

United States District Court

FOR THE DISTRICT OF COLUMBIA

Filed Dec. 3, 1987

FREDERICK A. SIEGERT,

Plaintiff,

v.

H. MELVYN GILLEY,

Defendant.

Judge Stanley Sporkin

ORDER

This case involves a claim by a clinical psychologist who was formerly employed at Saint Elizabeths Hospital and is now working in Germany. Plaintiff claims that defendant has deprived him of his due process rights and he has brought this action pursuant to the Fifth Amendment of the Constitution and the *Bivens* doctrine. He has also invoked the pendent jurisdiction of this court for his claims of defamation, intentional infliction of emotional distress and for interference with contractual relations.

The gravamen of plaintiff's complaint is that defendant's actions caused him to lose his opportunity to be credentialed as a clinical psychologist in Germany and also caused him to suffer a drastic reduction in his professional responsibilities. Plaintiff claims that defendant interfered with his employment as a clinical psychologist with the Army Medical Department in Bremerhaven, Germany. Plaintiff specifically asserts that defendant contacted, by telephone and by letter, Colonel William Smith, Jr., the Deputy Commander for Clinical Services in Bremerhaven and the Chairperson of the Credentials Committee. Plaintiff contends that

defendant's contacts with Colonel Smith were defamatory and led to his failure to be credentialed and the ensuing reduction in his professional responsibilities.

Defendant has moved for Summary Judgment and I have received briefs from both parties and heard argument on that motion. I have also recently received a copy (filed under seal) of a letter about the plaintiff sent by the defendant to Colonel Smith.

After careful review of the written materials and the argument, I am not prepared to decide this matter on a Summary Judgment motion at this time. I would like to see a more developed record. While I agree with defendant that matters of this kind should be disposed of summarily whenever possible, a limited amount of discovery in this case is warranted.

I particularly believe it would be appropriate to take the testimony of the two principal actors in this affair – plaintiff, Dr. Siegert, and defendant, Dr. Gilley. I also believe it would be useful to take the testimony of Colonel Smith. In addition, I see no reason why any correspondence between defendant and Colonel Smith should be withheld from plaintiff – including the October 23, 1985 letter filed under seal on November 23, 1987. That correspondence is undoubtedly relevant to this litigation. All such documents should be kept under seal but should be made available to plaintiff for discovery purposes.

It is therefore now hereby

ORDERED that plaintiff shall be permitted to take the deposition of defendant and Colonel Smith, and it is further

ORDERED that upon completion of those depositions, defendant shall be permitted to take the deposition of plaintiff, and it is further

ORDERED that upon completion of those depositions, I will again entertain all suitable motions.

Dated:

Stanley Sporkin
United States District Judge

CREDENTIAL INFORMATION REQUEST FORM

ST Elizabeths Hospital
Last place of Assignment
2700 Martin L King Ave
Address
Washington DC
City and State
20032
Zip Code

55a

Dear Sirs:

I am applying for previleges on the staff of the US-Army Hospital Bremerhaven, Federal Republic of Germany. To complete my application for credentials, I request you send the Deputy Commander for Clinical Services, all information on job performance and the privileges granted while I was a member of your staff. I further request that a copy of this information be provided to me for my personal records. This information should be sent as soon as possible, so the credential/privileges process can be expedited. Thanks for your cooperation.

Frederick A. Sargent PhD
Name
GS 12
Rank
Clinical Psychologist
Job Title
Bremerhaven USAMEDDAC
MTF

Present employer's address:
LTC William R. Smith Jr. MD
Deputy Commander for Clinical Services
USAMEDDAC Bremerhaven
APO NY 09069

Frederick A. Sargent
Signature

Supreme Court, U.S.
FILED
SEP 6 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-86

In the Supreme Court of the United States

OCTOBER TERM, 1990

FREDERICK A. SIEGERT, PETITIONER

v.

H. MELVYN GILLEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly dismissed this *Bivens* action on grounds of qualified immunity.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-96

FREDERICK A. SIEGERT, PETITIONER

v.

H. MELVYN GILLEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 5a-25a) is reported at 895 F.2d 797. The decision of the district court (Pet. App. 27a-52a) is reported at 692 F. Supp. 1406.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1990. A petition for rehearing was denied on April 16, 1990. Pet. App. 2a-4a. The petition for a writ of certiorari was filed on July 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From November 1979 until October 1985, petitioner was a psychologist at St. Elizabeth's Hospital, a federal government facility in Washington, D.C. On October 1, 1985, he resigned from St. Elizabeth's and began working as a psychologist at a U.S. Army hospital in Bremerhaven, West Germany. In an effort to secure staff privileges at Bremerhaven, petitioner requested that officials at St. Elizabeth's provide his Bremerhaven superiors with all information regarding his job performance at St. Elizabeth's. That request was referred to respondent, a supervisory psychologist at St. Elizabeth's. Respondent sent a letter to Bremerhaven, in which he stated that petitioner was inept, unethical, and untrustworthy. Petitioner alleged that he was subsequently unable to obtain suitable credentials, and was instead relegated to working as a librarian at Bremerhaven. Pet. App. 7a-8a.

Petitioner brought this action in November 1986, claiming that respondent's letter had caused him to lose his post as a psychologist at Bremerhaven, and had rendered him unable to obtain other appropriate employment in his field. Pet. App. 35a. Petitioner alleged that the statements in the letter were false, and that respondent had made those statements maliciously and in bad faith. Amended Compl. ¶¶ 21, 24 (C.A. App. 10-11). Relying in part on *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), petitioner sought six million dollars in damages against respondent in his individual capacity, contending that respondent had violated his rights under the Due Process Clause of the Fifth Amendment of

the United States Constitution. Amended Compl. ¶¶ 1, 21, 30 (C.A. App. 6, 10, 12); C.A. App. 14.[1]

Respondent thereafter filed a motion to dismiss or in the alternative for summary judgment. Respondent contended that petitioner's factual allegations, even if true, did not make out a violation of any constitutional rights. Respondent also asserted a defense of qualified immunity, contending that petitioner's allegations did not state a violation of any "clearly established" constitutional rights within the meaning of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

The district court denied respondent's motion. Pet. App. 27a-52a. The court held that petitioner's factual allegations were sufficient to state a due process claim, because it was well established at the time of the events that "a common law defamation is transformed into a constitutional deprivation of liberty when the government is the source of the defamatory allegations and the resulting 'stigma' involves 'some tangible change of status vis-a-vis the government.'" *Id.* at 44a. The court therefore ordered the parties to conduct certain prescribed discovery. *Id.* at 52a. See also *id.* at 54a.

2. The court of appeals reversed. Pet. App. 5a-25a. With respect to petitioner's "central contention"—that respondent had written the letter to Bremerhaven in bad faith (*id.* at 16a)—the court held that petitioner's allegations of improper motivation were too conclusory to overcome respondent's

---

[1] Petitioner also asserted common law tort theories of defamation, intentional infliction of emotional distress, interference with contractual relations, and interference with prospective advantage. Amended Compl. ¶¶ 2, 31-38 (C.A. App. 6, 12-14).

qualified immunity defense.[2] The court explained that where, as here, improper purpose is an essential component of a plaintiff's constitutional tort action, the plaintiff must allege specific, direct evidence of illicit intent. *Id.* at 11a-14a, 17a-18a. The court held that petitioner's allegations did not satisfy that "heightened pleading standard." *Id.* at 19a. The court stated that "the complaint's shortcoming is most evident in its allegation that [respondent] had acted in bad faith when he described [petitioner] as inept, unethical, and untrustworthy. * * * It merely asserts (and reasserts) that in making the statement he 'knew [it] to be false or [made it] with reckless disregard as to whether it was true.'" *Id.* at 17a.

Chief Judge Wald dissented in part. Pet. App. 19a-25a. Although she agreed with the majority that the district court's finding of no qualified immunity should be vacated (*id.* at 19a), she concluded that petitioner's factual allegations were sufficient "to warrant limited discovery before a judicial resolution of the qualified immunity issue" (*id.* at 24a).

---

[2] The court also ruled that, to the extent petitioner's *Bivens* action was premised on allegations of improper conduct irrespective of subjective intent, the allegations did not state a claim for violation of any clearly established constitutional rights. Pet. App. 14a-16a.

ARGUMENT

1. a. Petitioner contends (Pet. 18-22) that the court of appeals erred in applying a "heightened pleading standard," requiring him to allege specific, nonconclusory evidence of bad faith in order to overcome respondent's assertion of qualified immunity. There is no merit to that contention. The courts of appeals that have addressed the question have uniformly embraced such a heightened pleading standard; indeed, petitioner does not allege a conflict among the circuits. See, *e.g.*, *Collinson* v. *Gott*, 895 F.2d 994, 1002 (4th Cir. 1990) (Phillips, J., concurring in the judgment); *Rakovich* v. *Wade*, 850 F.2d 1180, 1210 & n.22 (7th Cir.) (en banc), cert. denied, 488 U.S. 968 (1988); *Pueblo Neighborhood Health Centers* v. *Losavio*, 847 F.2d 642, 649 (10th Cir. 1988); *Elliott* v. *Perez*, 751 F.2d 1472, 1476 (5th Cir. 1985); see also *Arnold* v. *Jones*, 891 F.2d 1370, 1373 n,3 (8th Cir. 1989); *Nuclear Transport & Storage, Inc.* v. *United States*, 890 F.2d 1348, 1354-1355 (6th Cir. 1989), cert. denied, 110 S. Ct. 1807 (1990).

Petitioner is mistaken in suggesting (Pet. 18) that the heightened pleading standard is inconsistent with this Court's decisions. As the Court has emphasized, *Bivens* actions "frequently run against the innocent as well as the guilty," and meritless claims impose substantial costs "not only [on] the defendant officials, but [also on] society as a whole." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). The Court has therefore insisted that lower courts take appropriate measures to ensure that insubstantial claims are terminated at the earliest possible stage in the litigation. See, *e.g.*, *id.* at 814, 815-816, 819 n.35; *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985); *Anderson* v.

Creighton, 483 U.S. 635, 640 n.2, 646 n.6 (1987).

The heightened pleading standard is applicable in cases in which subjective motivation is an element in the plaintiff's cause of action. Indeed, the point was underscored by this Court in *Harlow*, when it said (457 U.S. at 817-818): "[B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-ranging discovery." Were it possible to overcome a defense of qualified immunity simply by asserting that the question of the defendant's subjective intent is in dispute, the purpose of the qualified immunity defense would be seriously jeopardized. As the D.C. Circuit has observed (*Hobson* v. *Wilson*, 737 F.2d 1, 29 (1984), cert. denied, 470 U.S. 1084 (1985)):

> *Harlow* focused on the need to enable courts to dismiss "insubstantial" lawsuits before discovery and trial, and it [formulated] the qualified immunity defense to facilitate that goal. The kind of case we confront today, involving allegations of unconstitutional motive, offers to litigants a possible means to circumvent the * * * rule, simply by pleading that any act was performed with an intent to violate * * * constitutional rights * * *. * * * [I]n some instances, plaintiffs might allege facts demonstrating that defendants have acted lawfully, append a claim that they did so with an unconstitutional motive, and as a consequence usher defendants into discovery, and perhaps trial, with no hope of success on the merits. The result would be precisely the burden *Harlow* sought to prevent.

Accord, *e.g.*, *F.E. Trotter, Inc.* v. *Watkins*, 869 F.2d 1312, 1316 (9th Cir. 1989) ("This would allow precisely the type of suit that qualified immunity is meant to prevent"). To avoid that possibility, the

courts have held that once the qualified immunity issue is raised, a plaintiff must articulate specific allegations bearing on the defendant's improper purpose, and may not proceed simply on the basis of conclusory assertions. See, *e.g.*, *Losavio*, 847 F.2d at 649; *Rakovich*, 850 F.2d at 1210 & n.22; *Collinson*, 895 F.2d at 1002; see also *Elliott*, 751 F.2d at 1479, 1482. That "heightened" pleading standard strikes an appropriate balance between the interest in vindicating constitutional rights and the interest in shielding government officials from the burden of litigating potentially meritless constitutional claims. See, *e.g.*, *Losavio*, 847 F.2d at 648; *Martin* v. *D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1433 (D.C. Cir. 1987); *Collinson*, 895 F.2d at 1002.

There is no merit to petitioner's contention (Pet. 19) that the heightened pleading standard is too stringent because it precludes discovery. Discovery should not proceed where, as the court below determined, the plaintiff's allegations of malicious intent consist only of conclusory assertions. See *Harlow*, 457 U.S. at 817-818. Rather, the Court has emphasized, insubstantial constitutional tort claims against government officials "should be resolved at the earliest possible stage of [the] litigation" (*Anderson*, 483 U.S. at 646 n.6), and "*prior to discovery* * * * *if possible*" (*id.* at 640 n.2) (emphasis added).

Indeed, petitioner's contention that he is entitled on these pleadings to proceed with discovery misconceives the very nature of the protection that is afforded by qualified immunity. Qualified immunity is just that—an "*immunity from suit* rather than a mere defense to liability." *Mitchell*, 472 U.S. at 526. Accordingly, because "qualified immunity is in part

an entitlement not to be forced to litigate" (*id.* at 527), allowing discovery to proceed in inappropriate circumstances is itself an infringement upon an official's entitlement to qualified immunity. As this Court has stated, in qualified immunity cases "even such pretrial matters as discovery are to be avoided if possible," and "a defendant [properly] pleading qualified immunity is entitled to dismissal *before the commencement of discovery.*" *Mitchell*, 472 U.S. at 526 (emphasis added). She also *Harlow*, 457 U.S. at 818 ("discovery should not be allowed").[3]

Petitioner contends (Pet. 21-22) that the heightened pleading standard is inconsistent with Rule

[3] To be sure, this Court in *Anderson* indicated that in certain circumstances discovery "tailored specifically to the question of [the defendant's] qualified immunity" "may be necessary before [the defendant's] motion for summary judgment on qualified immunity grounds can be resolved." 483 U.S. at 647 n.6. As the court of appeals in the present case explained, however (Pet. App. 18a), those statements referred to a case in which the plaintiff and the defendant presented differing versions of the defendant's conduct. See 483 U.S. at 646-647 n.6. Here, by contrast, there is no dispute for present purposes that respondent composed and sent the letter; the only disputed question is whether he did so with impermissible intent. Nothing in *Anderson* suggests that petitioner may pursue discovery simply in the hope of garnering support for his otherwise unsupported belief that the letter was sent in bad faith. To the contrary, petitioner's approach, under which a plaintiff could proceed to discovery and trial based on conclusory allegations regarding the defendant's *subjective state of mind*, "would totally abandon the concern—which was the driving force behind *Harlow*'s substantial reformulation of qualified-immunity principles—that 'insubstantial claims' against government officials be resolved prior to discovery and on summary judgment if possible" (*Anderson*, 483 U.S. at 640 n.2).

8(a)(2) of the Federal Rules of Civil Procedure, which provides that a complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief."[4] In the context of constitutional tort actions seeking damages against individual government employees, however, this Court has emphasized that the rules of civil procedure must be applied so as to permit proper recognition of qualified immunity and to ensure the early termination of insubstantial suits. *Harlow*, 457 U.S. at 820 n.35; *Butz* v. *Economou*, 438 U.S. 478, 508 (1978). The heightened pleading standard—the requirement that when a claim of qualified immunity is raised, a plaintiff must adequately substantiate conclusory allegations as a condition of going forward—is integral to this objective. Thus, in this context, the standard is an appropriate application of the general requirement of Rule 8(a)(2) that a pleader must show his right to relief. See, *e.g.*, *Hobson*, 737 F.2d at 30; *Losavio*, 847 F.2d at 650. Indeed, anything less would seriously undermine the significance of the qualified immunity rule.

b. The court of appeals properly applied the heightened pleading standard in this case. The allegations of malice and bad faith in the amended complaint are conclusory. As the court of appeals correctly observed, the complaint "merely asserts (and reasserts) that in making the statement [that petitioner was inept, unethical and untrustworthy] he [respondent] knew [it] to be false or [made it] with reckless disregard as to whether it was true." Pet. App. 17a. See Amended Compl. ¶ 23 (C.A. App. 11) ("Defendant made the statement, para. 11, *supra*, knowing that it was untrue or with reckless disregard as to whether it was true or not");

[4] Petitioner similarly relies on the provision of Rule 9(b) that malice and other conditions of mind may be averred generally.

Amended Compl. ¶ 24 (C.A. App. 11) ("Defendant made the statement, para. 11, *supra*, in bad faith and with actual malice"); Amended Compl. ¶ 30 (C.A. App. 12) ("Defendant violated plaintiff's due process guarantees under the Fifth Amendment * * * by maliciously and in bad faith publishing a defamatory *per se* statement, para. 11, *supra*, which defendant knew to be untrue, or with reckless disregard as to whether it was true or not"). And petitioner's affidavit "add[ed] [no]thing more tangible." Pet. App. 17a. As the court of appeals noted (*ibid.*), the allegations of improper motive in the affidavit were "unsupported by any evidence beyond innuendo." See C.A. App. 24-29. The court of appeals' factbound assessment of the pleadings warrants no further review.

2. There is no merit to petitioner's additional contention (Pet. 22-24) that the court of appeals' qualified immunity analysis is contrary to this Court's decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988). This Court held in *Westfall* that a federal employee who has been sued for damages on a common law tort theory is not entitled to absolute immunity unless the challenged conduct is discretionary in nature. That holding has no bearing on the present case because the question of absolute immunity from common law claims is not at issue. Rather, this case concerns the analytically different question of qualified immunity from constitutional claims.

In the latter context, the "discretionary function" question that petitioner points to is governed not by *Westfall*, but by this Court's decision in *Davis* v. *Scherer*, 468 U.S. 183 (1984).[5] The Court in *Davis*

[5] This Court's decision in *Westfall* would be inapposite even if absolute immunity from common law claims were at issue here. Congress responded to the *Westfall* decision by enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified in pertinent part at 28 U.S.C. 2679). The new legislation provides federal government employees with absolute immunity from suit for common law tort claims that are based on acts or omissions within the scope of their employment. See §§ 5, 6, 102 Stat. 4564; H.R. Rep. No. 700, 100th Cong., 2d Sess. (1988). The statute was specifically intended to abrogate *Westfall*, and it applies retroactively to actions where, as here, the complaint was pending on the date of its enactment (November 18, 1988). §§ 2(a)(4), 8(b), 102 Stat. 4563, 4565-4566.

made clear that "the scope of the 'ministerial duty' exception to qualified immunity" is extremely narrow. *Id.* at 196 n.14. In particular, "[a] law that fails to specify the precise action that the official must take in each instance creates only discretionary authority." *Id.* at 197 n.14. Petitioner does not and could not argue that respondent's actions fell within this narrow definition of "ministerial duty." Cf. *McIntosh* v. *Weinberger*, 810 F.2d 1411, 1432 (8th Cir. 1987) ("plaintiffs have cited, and we can find, no recent case * * * in which a court has rejected qualified immunity simply because the official in question was performing a ministerial duty"), judgment vacated on other grounds, 487 U.S. 1212 (1988). Providing information about the job performance of a subordinate employee necessarily entails judgment and discretion, and petitioner does not allege that respondent acted contrary to a specific statutory or regulatory directive.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Acting Solicitor General *
STUART M. GERSON
Assistant Attorney General
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Attorneys

SEPTEMBER 1990

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* The Solicitor General is disqualified in this case.

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(4)

No. 90-96

In The

Supreme Court of the United States

October Term, 1990

FREDERICK A. SIEGERT,

Petitioner,

v.

H. MELVYN GILLEY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

JOINT APPENDIX

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Petition For A Writ Of Certiorari Granted October 15, 1990

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Case No. 86-3234

Frederick A. Siegert

v.

H. Melvyn Gilley

DOCKET ENTRIES

Date	Proceedings
1986	
Nov. 25	Complaint filed; summons issued (entry date: 11/28/86) [case assigned to Sporkin, J.].
1987	
Feb. 5	Motion by defendant to dismiss or in the alternative for summary judgment, with two exhibits [material facts not in dispute; affidavit of Eugene C. Stammeyer].
May 8	Opposition by plaintiff to defendant's motion to dismiss or in the alternative for summary judgment [with two exhibits: material facts in dispute; affidavit of Frederick A. Siegert].
May 26	Reply by defendant to plaintiff's opposition to defendant's motion to dismiss or in the alternative for summary judgment.
July 17	Motion of defendant to dismiss heard and taken under advisement.
Dec. 3	Order allowing plaintiff to depose defendant and Col. Smith and thereafter defendant may depose plaintiff and upon completion of depositions the Court will entertain all suitable motions [entry date: 12/7/87].

Dec. 15	Motion by defendant for reconsideration and for stay of discovery pending resolution of defendant's immunity claim.
1988	
Jan. 20	Opposition by plaintiff to defendant's motion for reconsideration and for stay of discovery pending resolution of defendant's immunity claim [entry date: 1/21/88].
Mar. 2	Reply by defendant to plaintiff's opposition to defendant's motion for reconsideration and for stay of discovery pending resolution of defendant's immunity claim.
June 30	Memorandum opinion and order filed denying defendant's motion for reconsideration and for a stay of discovery and directing parties to proceed with discovery [entry date: 7/5/88].
July 29	Interlocutory notice of appeal filed by defendant from order docketed 7/5/88.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5257

FREDERICK A. SIEGERT,

Appellee

v.

H. MELVYN GILLEY,

Appellant

DOCKET ENTRIES

Date	Proceedings
1989	
Jan. 9	Plaintiff's motion to dismiss.
Jan. 9	Per curiam order denying plaintiff's motion to dismiss (Starr, Williams, Sentelle, JJ.).
1990	
Feb. 9	Opinion and judgment reversing and remanding district court judgment with instructions that the case be dismissed (Buckley, D.H. Ginsberg, JJ.).
Feb. 9	Dissenting opinion by Wald, C.J.
Mar. 26	Plaintiff's petition for rehearing or suggestion for rehearing *en banc*.
Apr. 16	Order denying petition for rehearing and suggestion for rehearing *en banc*.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREDERICK A. SIEGERT, Ph.D.
4836 Siegert Lane
Galesville, MD 20765
(301) 867-2540

Plaintiff

v.

H. MELVYN GILLEY, Ph.D.
St. Elizabeth's Hospital
2700 Martin Luther King
Avenue, SE
Washington, DC

or

10712 Amherst Avenue
Silver Spring, MD

Civil Action
No. 86-3234
Sporkin, J.

COMPLAINT FOR DAMAGES

Jurisdiction

1. This action is being brought pursuant to 28 U.S.C. §1331 to redress the deprivation of rights guaranteed by the due process clause of the Fifth Amendment of the United States Constitution, and under doctrines announced in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

2. Plaintiff also invokes the pendent jurisdiction of this court as to his stated claims against defendant for defamation, for intentional infliction of emotional distress, for interference with contractual relations and for interference with prospective advantage.

3. Venue is proper in this District pursuant to 28 U.S.C. §1391(b) and (e). The acts complained of herein occurred in the District of Columbia.

Parties

4. Plaintiff is a clinical psychologist who is a resident of the State of Maryland but who temporarily resides in Bremerhaven, West Germany. He was employed for several years by St. Elizabeth's Hospital, Washington, DC ("St. E's"), just prior to the occurrence of the acts of defendant complained of herein. Plaintiff is currently employed by the Department of the Army, Headquarters, U.S. Army Medical Department Activity ("USAMDA"), in Bremerhaven, West Germany, although his professional responsibilities have been drastically curtailed, and his employment there may soon cease, due to defendant's acts.

5. Defendant is a resident of the State of Maryland. At all times pertinent hereto he was and is employed by St. Elizabeth's Hospital, Washington, DC, as its Chief Psychologist of the Godding/Noyes Division of this facility. He was plaintiff's immediate supervisor for approximately one year, until on or about October 1, 1985. Defendant is being sued in both his official and individual capacities.

Facts

6. Plaintiff, a clinical psychologist at St. Elizabeth's Hospital, resigned from his position there on or about October 1, 1985. His resignation was due, in part, to long-

standing and consistent professional and personal friction between defendant and himself.

7. On or about October 1, 1985, plaintiff became employed as a clinical psychologist by the USAMDA in Bremerhaven, West Germany. He had signed a 36-month employment contract with the Army on or about August 30, 1985.

8. Plaintiff's duties as a psychologist with the USAMDA entail seeing and working with patients who are hospitalized at the Army base in Bremerhaven. Pursuant to Army regulations, all clinical psychologists, *inter alia*, must be professionally "credentialed" in order to perform medical and related duties in hospitals operated by the Army.

9. On or about October 15, 1985, William R. Smith, Jr., LTC, MC, Deputy Commander for Clinical Services and Chairperson of the Credentials Committee at the USAMDA, contacted defendant to obtain employment information about plaintiff in reference to the issue of credentialing.

10. On October 23, 1985, defendant wrote to Dr. Smith about plaintiff. Defendant stated in that letter that he could not recommend plaintiff for privileges as a psychologist.

11. Moreover, defendant stated in his October 23, 1985 letter to Dr. Smith that defendant "consider[ed] Dr. Siegert to be both inept and unethical, perhaps the least trustworthy individual I have supervised in my thirteen years at" St. E's.

12. Because of defendant's statement, para. 11, *supra*, Dr. Smith notified plaintiff by letter dated November 27, 1985 that reports about him were "extremely unfavorable," and that the committee was therefore recommending that plaintiff not be credentialed. The letter also stated that the recommendation would be forwarded to USAMDA's Commander for final consideration, and that credentialing was a condition of employment.

13. Plaintiff learned of Dr. Smith's letter, para. 14 [sic], *supra*, on or about November 27, 1985.

14. As a result of the Credentialing Committee's recommendation, plaintiff was forced to hire an attorney to present his case for credentialing to USAMDA's Commander.

15. On January 21, 1986, plaintiff was credentialed by USAMDA's commander.

16. Notwithstanding the Commander's action, para. 17 [sic], *supra*, Dr. Smith threatened to "get" plaintiff in any event, and otherwise made plaintiff's work environment difficult, unpleasant, and extremely stressful.

17. As a result of Dr. Smith's attitude, which had been formulated by defendant's statement, para. 11, *supra*, plaintiff began to look and apply for other jobs. In July 1986 plaintiff was hired as a clinical psychologist at another army hospital in Stuttgart, West Germany.

18. On or about July 14, 1986 plaintiff reported for work in Stuttgart but was informed that he "was not wanted" because of what they had heard about him.

19. On or about July 24, 1986 plaintiff was informed that his credentials were being reviewed at the USAMDA

where he had returned to work after his rejection at Stuttgart. The USAMDA was forced to take plaintiff back because of his civil service status.

20. Plaintiff is waiting for a decision from Dr. Smith's Credentials Committee as to whether plaintiff's credentials will be revoked.

21. Plaintiff's due process guarantees under the Fifth Amendment of the United States Constitution have been severely if not irreparably violated as a direct and proximate result of defendant's statements, para. 11, *supra*, in that defendant maliciously and in bad faith attempted to destroy, or has destroyed, plaintiff's ability to earn a livelihood as a clinical psychologist.

22. The statement, para. 11, *supra*, is defamatory *per se* and is untrue.

23. Defendant made the statement, para. 11, *supra*, knowing that it was untrue or with reckless disregard as to whether it was true or not.

24. Defendant made the statement, para. 11, *supra*, in bad faith and with actual malice.

25. Plaintiff's professional reputation has been and is severely if not irreparably damaged as a direct and proximate result of defendant's statement, para. 11, *supra*.

26. Plaintiff suffers and continues to suffer severe emotional distress as a direct and proximate result of defendant's statement, para. 11, *supra*, which was intentionally or recklessly made, and which constitutes extreme and outrageous conduct.

27. Plaintiff's contractual relations have been severely if not irreparably interfered with as a direct and proximate result of defendant's statement, para. 11, *supra*, which was made in bad faith and maliciously.

28. Plaintiff's future contractual and other types of professional or business relationships have been severely if not irreparably interfered with as a direct and proximate result of defendant's statement, para. 11, *supra*, which was made in bad faith and maliciously.

Count I: Violation of Plaintiff's Due Process Guarantees

29. Plaintiff incorporates herein by reference the allegations contained in paras. 1 through 28, *supra*.

30. Defendant violated plaintiff's due process guarantees under the Fifth Amendment and under doctrines announced in *Bivens*, *supra*, by maliciously and in bad faith publishing a defamatory *per se* statement, para. 11, *supra*, which defendant knew to be untrue, or with reckless disregard as to whether it was true or not. As a direct and proximate cause of defendant's conduct, plaintiff's professional reputation has suffered severe and irreparable damage for which defendant is officially and individually liable.

Count II: Defamation (Libel)

31. Plaintiff incorporates herein by reference the allegations contained in paras. 1 through 30, *supra*.

32. Defendant published a statement about plaintiff, para. 11, *supra*, which is defamatory *per se*, knowing it to be untrue or with reckless disregard as to whether it was

true or not, and in bad faith and with actual malice. As a direct and proximate cause of defendant's conduct, plaintiff's professional reputation has suffered severe and irreparable damage for which defendant is officially or individually liable.

Count III: Intentional Infliction of Emotional Distress

33. Plaintiff incorporates herein by reference the allegations contained in paras. 1 through 32, *supra*.

34. Defendant, while acting in an extreme and outrageous manner, intentionally or recklessly published a defamatory *per se* statement about plaintiff, para. 11, *supra*, causing him severe and long-lasting emotional distress for which defendant is officially or individually liable.

Count IV: Interference with Contractual Relations

35. Plaintiff incorporates herein by reference the allegations contained in para. 1 through 34, *supra*.

36. Defendant intentionally and maliciously interfered with plaintiff's contract with USAMDA by publishing a defamatory *per se* statement about him, para. 11, *supra*, causing plaintiff severe financial damage for which defendant is officially or individually liable.

Count V: Interference with Prospective Advantage

37. Plaintiff incorporates herein by reference the allegations contained in paras. 1 through 36.

38. Defendant intentionally and maliciously interfered with plaintiff's future contractual and other professional relations by publishing a defamatory *per se* statement about him, para. 11, *supra*, causing plaintiff severe financial damage for which defendant is officially or individually liable.

WHEREFORE, plaintiff requests that this Court:

a. Award plaintiff one and a half million dollars ($1,500,000) in compensatory damages against defendant;

b. Award plaintiff two and a half million dollars ($2,500,000) in punitive damages against plaintiff [sic];

c. Award plaintiff costs of this suit and reasonable attorney's fees; and

d. Grant such other relief as this Court deems just.

Respectfully submitted,

/s/

Nina Kraut, #348185
Suite 302
1555 Connecticut Avenue, NW
Washington, DC 20036
745-0300

Attorney for Plaintiff

Demand for Jury Trial

Pursuant to Rule 38, Fed. Rules Civ. Proc., plaintiff hereby demands a trial by jury.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREDERICK A. SIEGERT, Ph.D.	:	
Plaintiff	:	Civil Action
v.	:	No. 86-3234
	:	Judge Sporkin
H. MELVYN GILLEY, Ph.D.	:	
Defendant	:	

STATEMENT OF MATERIAL FACTS NOT IN ISSUE
PURSUANT TO LOCAL RULE 108(h)

Pursuant to Local Rule 108(h), defendant H. Melvyn Gilley submits this statement of material facts as to which he contends there is no dispute, in support of his alternative motion for summary judgment. These facts are supported by the Affidavit of Dr. Stammeyer, attached as Exhibit A.

1. Saint Elizabeths Hospital is a federal mental hospital located in Washington, D.C.

2. The defendant, H. Melvyn Gilley, Ph.D., is employed by the federal government as a supervisory psychologist for the Noyes/Godding Division, Saint Elizabeths Hospital, Washington, D.C.

3. In the normal course of his duties as a supervisory psychologist for Saint Elizabeths Hospital, and at the request of the Director of Psychology at the Hospital, Dr. Gilley responded in October of 1985 to a request for a reference concerning the plaintiff, Frederick A. Siegert, Ph.D. Dr. Siegert had formerly been employed at Saint Elizabeths Hospital as a staff psychologist under the supervision of Dr. Gilley. Dr. Gilley's response is being

filed under seal and all of plaintiff's claims in this action arise from said response.

4. The plaintiff, Dr. Siegert, consented in writing to the release of information to the Department of the Army by employees of Saint Elizabeths Hospital concerning his job performance while he was an employee of the Hospital.

5. The plaintiff, Dr. Siegert, resigned from Saint Elizabeths Hospital on or about October 1, 1985. His resignation followed his receipt of an advance notice of proposed removal, from the director of his division, based on his inability to report for duty in a dependable and reliable manner, his failure to comply with supervisory directives, and cumulative charges of absence without approved leave.

Respectfully submitted,

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United States Attorney

ROYCE C. LAMBERTH #109761
Assistant United States Attorney

OF COUNSEL:

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Assistant United States
Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREDERICK A. SIEGERT, Ph.D.	:	
Plaintiff	:	Civil Action
v.	:	No. 86-3234
	:	Judge Sporkin
H. MELVYN GILLEY, Ph.D.	:	
Defendant	:	

AFFIDAVIT

COMES NOW EUGENE C. STAMMEYER, Ph.D., after being duly sworn, and states as follows:

1. I have been employed by the federal government as the Director of Psychology, Saint Elizabeths Hospital, Washington, D.C., since 1973.

2. The defendant in this matter, H. Melvyn Gilley, Ph.D., has been employed by the federal government since 1972 as a supervisory psychologist at Saint Elizabeths Hospital, Washington, D.C. During 1985, he was the supervisory psychologist for the Noyes/Godding division.

3. As Director of Psychology, I often receive requests for references, which frequently ask for information needed for credentialing, from employers who are in the process of hiring psychologists who previously worked at Saint Elizabeths Hospital. I normally refer these requests to the supervisory psychologist who was that employee's supervisor prior to his departure from Saint Elizabeths Hospital.

4. In October of 1985, I received a request for a reference from the United States Army, asking for information needed for credentialing, concerning plaintiff Frederick A. Siegert, Ph.D. Since Dr. Siegert had been under the supervision of defendant Dr. Gilley when he worked at Saint Elizabeths Hospital, I referred this matter to Dr. Gilley for his response. Dr. Gilley's response to this request was within the normal duties performed by him as a supervisory psychologist at Saint Elizabeths Hospital.

5. A release signed by Dr. Siegert, attached as Exhibit B, was received by Saint Elizabeths Hospital pursuant to Dr. Siegert's request for references necessary for the credentialing process by his new employer.

6. A copy of Dr. Gilley's letter to Lt. Col. William Smith, Deputy Commander for Clinical Services, USDA MEDDAC, which he wrote pursuant to my request for a reponse [sic] to the reference inquiry concerning Dr. Siegert, is being filed under seal.

7. I am familiar with the circumstances under which Dr. Siegert left the employment of Saint Elizabeths Hospital. Dr. Siegert resigned subsequent to receiving an advanced notice of his proposed removal from Dr. Humphrey, the Director of the Noyes/Godding division at Saint Elizabeths Hospital. In this notice, Dr. Siegert was informed that his proposed removal was based upon his inability to report for duty in a dependable and reliable manner, his failure to comply with supervisory directives, and cumulative charges of absence without approved leave.

/s/
EUGENE C. STAMMEYER, Ph.D.

Sworn and subscribed to before me this 27th day of January, 1987.

/s/
Ann M. Celia
Notary Public, D.C.

My commission expires: 11/30/91

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREDERICK A. SIEGERT Plaintiff v. H. MELVYN GILLEY Defendant	)	Civil Action No. 86-3234 Judge Sporkin

STATEMENT OF MATERIAL FACTS IN ISSUE
PURSUANT TO LOCAL RULE 108(h)

Pursuant to local Rule 108(h), plaintiff submits this statement of material facts as to which he contends there exist genuine issues necessary to be litigated in opposition to defendant's alternative Motion for Summary Judgment.

1. Defendant is not entitled to absolute or qualified immunity.

2. It is beyond the outer perimeters of defendant's job responsibilities to make false statements about employees or former employees. Amended Complaint, para. 11.

3. Defendant's statement in his October 23, 1985 letter is false or was made with reckless disregard as to whether it was true or not, and was intentionally made in bad faith and maliciously. Complaint, paras. 11, 22-24, 30, 32, 34, 36, 38.

4. As a direct result of defendant's statement in his October 23, 1985 letter, plaintiff has and is suffering damage to his professional reputation and his ability to earn a

living, *inter alia*. Amended Complaint, paras. 14, 16, 17-19, 25-28, 32, 34, 36, 38.

5. Defendant's position at St. Elizabeths was as a low level, non-policy-making supervisor. Para. 2, Siegert Aff.

6. Plaintiff did not consent in writing or in any other manner to the release of information concerning his job performance at St. Elizabeths by any of its employees. Plaintiff did consent to the release of information to the Department of the Army as to his credentialing status at St. Elizabeths. Amended Complaint, para. 9.

7. Plaintiff resigned from St. Elizabeths because of professional and personal conflicts with defendant, and because he had wanted to find a position in Europe in any event due to his relationship with a woman there. Para. 6, Siegert Aff.; Amended Complaint, para. 6.

8. Plaintiff reported for duty at St. Elizabeths in a dependable and reliable manner when he was medically able to do so, complied with supervisory directives, and was not absent without approved leave from his job there.

9. Defendant's October 23, 1985 statement is defamatory *per se*. Amended. Complaint, para. 32.

Respectfully submitted,

/s/

Nina Kraut, #348185
1555 Connecticut Ave., NW, #302
Washington, DC 20036
745-0300

Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREDERICK A. SIEGERT Plaintiff	)	
v.	)	Civil Action No. 86-3234 Judge Sporkin
H. MELVYN GILLEY Defendant	)	

AFFIDAVIT OF FREDERICK A. SIEGERT

I, Frederick A. Siegert, hereby depose and state:

1. I am a clinical psychologist and was employed as such at St. Elizabeths Hospital from about November of 1979 until I resigned in October 1985. I was specifically hired because of my extensive experience in working with mentally retarded children and with adults who had mental ages of up to 6 years of age.

2. For most of the time I was employed at St. Elizabeths I was the Behavior Therapy Coordinator representing the Noyes/Godding Division. Additionally, I was temporarily the supervisory psychologist of the Noyes/Godding Division for a period in 1984.

3. In February 1985 I was hit in the head by a patient at St. Elizabeths. As a result, I had to take a considerable amount of medical leave time off from work. Some of that time away had been noted as "AWOL" on St. Elizabeths records. However, I have been fully compensated for that time.

4. The defendant became head of the Noyes/Godding Division of St. Elizabeths just prior to my injury,

para. 3, *supra*. It is my understanding that he resented my being away from work for the length of time I was since my absence created additional burdens for him. Additionally, he resented my resistance as well as the resistance of others to his attempts to modify some aspects of the behavior modification program that had been in operation for several years. These attempts were resisted because the defendant knew almost nothing about behavior therapy.

5. Prior to my professional relationship with the defendant, I had received exemplary job performance ratings by other supervisors under and with whom I had worked during the five years I had been employed at St. Elizabeths. For example, from January 1984 through December 1984 my job performance was rated as "outstanding." Except when I was on medical leave, I reported for work in a dependable and reliable manner, complied with reasonable supervisory directives and was not absent from work without leave. Further, my integrity and ethics as a psychologist and as a co-worker were never brought into question in any manner whatsoever.

6. In the Spring of 1985 I began to make inquiries about jobs in Europe and elsewhere. I began to make job applications at this time because I had already been able to discern that working under or with the defendant was professionally and personally impossible. In May 1985 the Department of the Army indicated that I would be considered for vacancies in Europe as a Clinical Psychologist/Counseling Psychologist/Psychologist, GS-180-12/13.

7. In August 1985 I signed a 36-month contract with the Department of the Army to work at the Army base

hospital in Bremerhaven, West Germany as a clinical psychologist in the Exceptional Family Member Program.

8. According to the job description, and as actually experienced in that role, my duties consisted primarily of working with children on an out-patient basis, although, of course, I also worked with members of their families on a more limited basis. Prior to my taking this job I had had considerable training and experience in working with children, at St. Elizabeths, at Forest Haven, and elsewhere, in programs similar to that at Bremerhaven. Additionally, I have trained numerous counselors in areas relating to child development and behavior therapy. Working with children who are mentally retarded, and with adults with mental ages of young children, is, in a nutshell, my area of specialty and expertise.

9. In early September or late August 1985 I received an advanced notice that I was going to be terminated from my job at St. Elizabeths. I believe that the proposed removal was due to my conflicts with the defendant, *supra*, para. 4, as well as because of the bureaucratic mix-ups concerning my medical leave status, *supra*, para. 3. I met with an assistant superintendent from the hospital and with a member of the Personnel Department there. They indicated that the letter of "removal" would not be placed in my personnel file if I resigned from my position. I informed them that I had signed or was about to sign a contract with the Army, *supra*, para. 7, and that therefore I would be resigning in any event. I did so on or about October 1, 1985 and began my employment with the Army shortly thereafter.

10. A condition of employment with the Department of the Army was that I be "credentialed" as to the treatment of children and, independently, as to the treatment of adults. My supervisor at Bremerhaven contacted Eugene Stammeyher [sic], Director of Psychology at St. Elizabeths, in October 1985 to obtain information as to my credentials status while I had been employed there. I had signed a "Credential Information Request Form," addressed to St. Elizabeths, to expedite that process.

11. On or about November 27, 1985 I learned for the first time that the defendant had falsely provided my Bremerhaven supervisors with information that is the basis of this lawsuit. Para. 11, Amended Complaint.

12. As a direct result of that information, para. 11, *supra*, my credentials as to children have been revoked. In the Fall of 1987, I learned that my efforts to appeal that revocation had failed.

13. As a result of that information, *supra*, para. 11, my credentials as to adults were revoked but were subsequently restored. However, due to the nature of my duties in the Exceptional Family Member Program, working with adults is irrelevant if I am not able to work with their children.

14. Until I had heard that my appeal of the credentialling [sic] decision as to children was denied in the Fall of 1987, I worked in the medical library at the Army base hospital while waiting for the appeals process, and while looking for a new position in Europe.

15. In the Summer of 1986, and directly because of the difficulty I was having in being credentialed, I applied for a psychologist position at an Army base in Stuttgart. When I went to report there for work on July 28, 1986, I was literally turned away and was told that I was not wanted because of what they had heard about me from Bremerhaven personnel. I returned to Bremerhaven to continue in my efforts to be credentialed.

16. On December 7, 1987 I was notified that my appeal of the August 1987 decision of the Surgeon General of the Department of the Army had failed, and that as of December 16, 1987, my federal service employment has been terminated. The termination, and my inability to find work as a psychologist in the public or private sector is a direct result of defendant's statements, *supra*.

17. As a direct result of that information provided by the defendant, para. 11, *supra*, I have had to expend more than $10,000 in legal fees in West Germany alone in order to have adequate representation as to the appellate process in regaining my credentials.

18. As a direct result of the information provided by the defendant, para. 11, Amended Complaint, I have suffered severe emotional distress, have been unable to work in the area of my specialty, or in anything even remotely connected to it, and have been unable to find another position with comparable responsibilities.

/s/
FREDERICK A. SIEGERT

Subscribed and sworn to before me on this 28th day of January, 1988.

/s/
Pamela A. Dunham
Notary Public

My commission expires: 7-1-90

[SEAL]

Supreme Court, U.S.
FILED
NOV 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 90-96

In The

Supreme Court of the United States

October Term, 1990

FREDERICK A. SIEGERT,

Petitioner,

v.

H. MELVYN GILLEY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. In a *Bivens* claim for damages in which malice has been alleged and where qualified immunity has been raised as a defense, whether a "heightened pleading" standard which precludes limited discovery prior to disposition on a summary judgment motion violates applicable law?

2. In a *Bivens* claim for damages, whether a federal official can be qualifiedly immune from suit without regard to whether the challenged conduct was discretionary in nature?

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No. 90-96

In The

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FREDERICK A. SIEGERT,

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v.

H. MELVYN GILLEY,

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On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The April 16, 1990 order of the United States Court of Appeals for the District of Columbia Circuit denying *en banc* review, with a concurring opinion (Wald, C.J.), and that court's April 16, 1990 order denying rehearing, with a dissenting statement (Wald, C.J.), are unreported and are printed in the appendix to the petition for certiorari (hereinafter referred to as "App.") at, respectively, App. 2a, 3a and 4a. The February 9, 1990 opinion and order of the court below reversing the trial court's denial of

respondent's summary judgment motion is reported at 895 F.2d 797 (D.C. Cir. 1990). App. 5a. The June 30, 1988 opinion and order of the trial court denying respondent's motion for reconsideration of its conditional denial of respondent's motion to dismiss or in the alternative for summary judgment, is reported at 692 F.Supp. 1408 (D.D.C. 1988). App. 27a. The trial court's December 3, 1987 opinion and order conditionally denying respondent's motion to dismiss or in the alternative for summary judgment, pending limited discovery, is unreported. App. 53a.

JURISDICTION

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

This case involves the following constitutional provision and federal rules: the Fifth Amendment to the United States Constitution and Rules 8, 9 and 56 of the Federal Rules of Civil Procedure. This provision and the rules are printed in the appendix to this brief.

STATEMENT OF THE CASE

Until defendant committed the act complained of in this case, plaintiff had received exemplary job performance ratings during his several years of employment at Saint Elizabeths Hospital. He was a psychologist there whose specialty was treating severely retarded children and adults and, for most of his employment from 1979 to 1985, he was the coordinator of the hospital's behavior modification division. J.A. 19, 20. Defendant, also a psychologist, became the supervisor of plaintiff's division, and was plaintiff's immediate supervisor, beginning in January 1985. J.A. 14, 20. From the start, the defendant, who had little training or experience in the field of behavior modification, clashed with plaintiff and others in the division because they resisted defendant's efforts to change certain aspects of that program which had been in operation for several years. J.A. 20.

In February 1985, plaintiff was injured by a patient which caused more grist for conflict between plaintiff and defendant. J.A. 20. Due to his injury, plaintiff took months of medical leave time away from work, a factor resented by defendant. J.A. 20. Most of that leave was erroneously noted as "A.W.O.L." and was initially logged as being noncompensable. Plaintiff was later compensated for all of that time. J.A. 19.

In the spring of 1985, plaintiff began to look for a new position because he knew that working with defendant would be professionally and personally impossible. In May of that year the Department of the Army notified him that he would be considered for vacancies in Europe as a psychologist, J.A. 20, and in August 1985, plaintiff

signed a 36-month contract to work as a clinical psychologist in the "Exceptional Family Member Program" at the Army hospital in Bremerhaven, West Germany. J.A. 20.

In late August or early September 1985 plaintiff was informed that he was going to be fired from Saint Elizabeths. Plaintiff believed that the reasons for the Hospital's proposed action were because he had been A.W.O.L. from his job, which was untrue, and because of professional disagreements with defendant. J.A. 21. Plaintiff was told that if he resigned from Saint Elizabeths a letter listing the reasons for the proposed removal, and information as to the fact of the proposed removal, would not be placed in his personnel file. J.A. 21. To "avoid a termination that might damage his reputation," App. 8a, "to protect his future job prospects," App. 33a, and since he was about to sign or had just signed a 36-month contract with the Army, plaintiff assented to the agreement. J.A. 21.

Pursuant to his agreement with Saint Elizabeths, he did resign from his job on October 1, 1985. Soon after, he began to work with mentally retarded children and with members of their families at the Army base hospital in Bremerhaven. J.A. 21.

On October 15, 1985, plaintiff signed a "Credential Information Request Form." App. 55a. "Credentials" are synonymous with "privileges" and are granted by each hospital's medical staff or board. If a person wants to practice a particular specialty, he or she must be granted particular privileges in conformity with that specialty's standards, such as educational requirements, years of

practice, and type and quality of supervision, as established by the hospital's board. App. 34a. Being credentialed in order to treat mentally retarded children, and being separately credentialed in order to work with adult members of their families, was a condition of plaintiff's employment with the Army. J.A. 22.

The Form authorized Saint Elizabeths to release to plaintiff's Army supervisor, Col. William R. Smith, "all information on job performance and the privileges granted while I [the plaintiff] was a member of your staff. . . ." App. 55a. It had been sent by Col. Smith to Eugene Stammeyer, Director of Psychology at Saint Elizabeths, J.A. 22, who channelled it to defendant as plaintiff's last supervisor at the Hospital. J.A. 14-15. Defendant failed to respond to any of the information which the Form specifically sought. Instead, on October 23, 1986, and wholly within the context of information about plaintiff's alleged A.W.O.L. status and his forced resignation, defendant wrote to Col. Smith that plaintiff was " . . . inept and unethical, perhaps the least trustworthy individual I have supervised in my thirteen years in this hospital."[1]

On November 27, 1985, and because of the information which had been provided by defendant, plaintiff learned that the Army would not recommend privileges for him to practice his specialty. J.A. 7, 22. During the next two years, plaintiff worked in the hospital's medical library and unsuccessfully tried to find another job in the

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[1] The government's request that the letter be filed under seal was granted by the district court in February 1987.

area of his specialty. For example, he was denied a psychologist position at the Army hospital in Stuttgart because of what they had "heard" about him from Bremerhaven personnel. J.A. 7, 22, 23. Alternately, he was allowed to practice his specialty at Bremerhaven, J.A. 22, but after losing the credentials that sporadically and provisionally had been granted by the Army during the credentials appeal process, plaintiff was terminated from federal employment in December 1987. He has not been able to find work in the public or private sectors since then which is comparable to what he had done for most of his professional career. J.A. 23.

On November 25, 1986, plaintiff filed a *Bivens*[2] action against defendant in the United States District Court for the District of Columbia. J.A. 4. In addition to several pendent claims, he alleged that his Fifth Amendment substantive due process guarantees had been violated as a result of defendant's malicious and intentional communication of a false and defamatory statement. Plaintiff also claimed that his professional reputation and his ability to earn a livelihood as a psychologist practicing in his field had been irreparably damaged as a result of defendant's act. J.A. 7-9.

Defendant filed a motion to dismiss or for summary judgment on February 5, 1987. Relying on *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and claiming a lack of a clearly established constitutional prohibition against the furnishing of a "reference" pursuant to a request from

[2] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

plaintiff's new employer, defendant claimed he was qualifiedly immune from suit. Motion By Defendant to Dismiss Or In The Alternative For A Summary Judgment, at 11. Attached to the motion was a statement of material facts which defendant claimed were not in issue and an affidavit signed by Dr. Stammeyer. J.A. 12-16. Dr. Stammeyer defined what the Army had requested as a "reference . . . asking for information needed for credentialing, . . . " J.A. 15, and in the statement of material facts not in issue, defendant claimed he had responded to a "request for a reference," and that plaintiff had consented to the release of information "by employees of Saint Elizabeths Hospital concerning job performance." J.A. 12-13.

In opposition, plaintiff stated that it was "beyond the outer perimeters of defendant's job responsibilities to make false statements about employees, . . . " J.A. 17, and that he had "consented to the release of information . . . as to his credentialing status," J.A. 18, but not to information concerning job performance "by any of [Saint Elizabeths] employees. . . . " J.A. 18. He also argued that responding to a Credential Information Request Form was a "ministerial task." Memorandum Of Points and Authorities In Support Of Plaintiff's Opposition To Defendant's Motion To Dismiss or Alternatively For Summary Judgment, at 7. An affidavit was filed with his opposition. J.A. 19-24.

On December 3, 1987, the district court (Sporkin, J.) stated that it could not rule on defendant's summary judgment motion until depositions of the parties and of Col. Smith had taken place. App. 53a-54a. Consequently, it held defendant's motion in abeyance and invited

renewed motions at the conclusion of discovery. App. 54a. On December 15, 1987 defendant asked the court to reconsider its decision.

On June 30, 1988 the district court denied defendant's motion for reconsideration, "rejected his qualified immunity defense," and ordered the discovery which previously had been ordered to proceed to determine whether there were material facts – "if the information supplied by defendant is true, and the plaintiff is plainly incompetent and derelict" – which were genuinely in dispute. App. 52a. Consistent with the criteria in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 483 U.S. 635 (1987), and as particularized in *Doe v. United States Dep't. of Justice*, 758 F.2d 1092 (D.C.Cir 1985) and in *Bartel v. F.A.A.*, 725 F.2d 1403 (D.C.Cir. 1984), the court's denial was based on its determination that there were clearly established constitutional and statutory rights which plaintiff claimed had been violated contained in the idea that an "individual need not be permitted to intentionally or maliciously provide false information . . . in job references." App. 52a.

On February 9, 1990 the Court of Appeals reversed the denial of defendant's motion for reconsideration, vacated the lower court's discovery order and remanded the case with instructions that it be dismissed. App. 19a. The majority (Buckley, D.H. Ginsberg, JJ.) analyzed the case from two perspectives.[3] Objectively, it defined the

[3] Neither addressed plaintiff's allegations that defendant knowingly had made false statements.

right at issue by stressing that "the relevant question . . . is not whether Gilley misunderstood the nature of the information requested, but whether the constitutional right claimed by Siegert was so clearly established that a reasonable person would have known that a candid response to such an official inquiry might give rise to liability for damages." App. 16a. The majority considered the district court's definition of the right alleged insufficiently particularized to comport with *Anderson*, and it distinguished *Doe* and *Bartel* by the claim that neither case involved "a response by a government official to a request for information about a former employee from a prospective government employer." App. 15a. Under this analysis, the majority held that defendant's actions did not violate a right that was clearly established in October 1985. App. 16a.

Second, the majority determined that if plaintiff's assertions as to defendant's subjective intent could meet the circuit's heightened pleading requirements, defendant's bad faith "would suffice to make Gilley's actions in writing the letter a violation of Siegert's constitutional rights." App. 16a-17a. The majority found, however, that plaintiff's allegations contained only "innuendo," were too circumstantially pleaded, and failed to allege with "direct evidence" that "Gilley had acted in bad faith. . . ." App. 17a. Relying on *Hobson v. Wilson*, 737 F.2d 1 (D.C.Cir. 1984), it stated that "conclusory allegations of this sort will not suffice to subject government officials to the burdens of discovery or trial." App. 17a.[4] Finally, and

[4] Pursuant to *Hobson*, the majority claimed that offers of proof of unconstitutional motive "must conform to a higher standard than that generally provided for in the Federal Rules. . . . " App. 13a.

in contradiction of the trial court's stated rationale, the majority found the discovery which had been ordered "impermissible" under *Harlow* because its purpose "was not to establish the factual basis for determining the objective legal reasonableness of Gilley's actions, but to inquire into their motivation." App. 18a. ("[U]nder this court's heightened pleading standard, in order to obtain even limited discovery, such intent must be pleaded with . . . direct as opposed to merely circumstantial evidence of the intent."). App. 14a.

The dissent (Wald, C.J.) zeroed in on the "dilemma" created by the circuit's "heightened-pleading-with-no-discovery" rule:

> "[P]laintiffs are required to adhere to a 'heightened pleading standard' of nonconlusory facts that demonstrate a government official's unconstitutional motive, but they are entirely restricted from obtaining through discovery the information necessary to make that showing."

App. 19a. According to Chief Judge Wald, the standard reflected a "misguided approach to our 'twin goals' of 'limit[ing] the litigation burdens placed on government officials by insubstantial lawsuits' and 'preserving the opportunity for plaintiffs to vindicate constitutional rights.' " App. 20a. Consistent with this view, the dissent stated that instead of "slam[ming] shut this window for discovery through . . . [an] unyielding application of the heightened pleading standard," App. 24a, that is, when "proof of the defendant's motive is peculiarly in the defendant's hands," App. 20a, limited discovery ought to be permitted in order to "preserve a plaintiff's constitutional rights," App. 21a, while simultaneously "enabling

Government officials to avoid the rigors of 'protracted' discovery." App. 21a.

Having to conform its analysis to the circuit's heightened pleading rule, Chief Judge Wald found that although the trial court correctly determined that it was clearly established in late 1985 that plaintiff had a right to a "good faith evaluation," App. 24a, the lower court failed to determine whether his allegations of malice had met the heightened pleading standard. App. 24a. Thus, she found it appropriate to vacate the lower court's denial of the qualified immunity defense, but emphasized that because plaintiff's pleadings contained "the necessary specificity to warrant limited discovery," App. 24a, his case should not be dismissed. Specifically, she noted that the following factors "provided some evidentiary basis for [plaintiff's] contention that Gilley's motives were malicious and unconstitutional":

> 1. Gilley had embarked on a course of making Siegert's professional life at Saint Elizabeths unpleasant because he resented Siegert's a) lengthy medical leave and b) his resistance to Gilley's attempts to alter the Hospital's behavior modification program;
>
> 2. Siegert had a history of excellent job performance ratings until Gilley became his supervisor;
>
> 3. The "extreme" language in Gilley's letter "which inherently casts doubt on the author's neutrality."

App. 24a-25a. Based on these factors, the dissent found that plaintiff could plausibly defeat the qualified immunity defense "if armed with sufficient evidence," App.

24a, and that the trial court "certainly had some basis for permitting a limited inquiry into motive." App. 25a.

On April 16, 1989 plaintiff's petition for rehearing and suggestion for rehearing *en banc* were denied. App. 2a-4a. In her comment accompanying the denial of the *en banc* suggestion, Chief Judge Wald stated that the heightened pleading standard, especially where no discovery is allowed, "raises serious questions of fairness and justification under existing Supreme Court precedent." App. 3a.

Plaintiff filed his petition for a writ of certiorari on July 13, 1990. It was granted on October 15, 1990.

SUMMARY OF ARGUMENT

Whatever term one wants to use to describe a substantive due process violation – "shocking to the conscience," "arbitrary," "abuse of power," or "outrageous" – one occurred here. Because it did, qualified immunity should have been defeated as a defense and rules of pleading and standards of proof should not have been contorted in order to protect a federal official from the consequences of his knowing, malicious, unconstitutional misdeed.

I. Even assuming, without conceding, that the letter which defendant wrote was a solicited, discretionary "reference," plaintiff alleged two constitutional rights which satisfied the *Harlow-Anderson* criteria. First, and independent of malice, he alleged the constitutional right to be free from an official's act which caused a stigma-plus injury. *Paul v. Davis*, 424 U.S. 693 (1976). This right

was clearly established and further particularized in *Doe v. United States Dep't. of Justice*, 753 F.2d 1092 (D.C.Cir. 1985) and *Bartel v. F.A.A.*, 725 F.2d 1403 (D.C.Cir. 1984). Although the facts in *Doe* and *Bartel* are not on "all fours" with plaintiff's, his allegations satisfy *Anderson's* "sufficiently clear" criteria.

Second, plaintiff alleged malice as a part of the constitutional tort which was clearly established in October 1985. That is, he alleged that malice plus injury to his reputation plus injury to his ability to earn a living, that is, the "stigma-plus" test established in *Paul v. Davis*, 424 U.S. 693, 711-712 (1976) – plus malice – was also a clearly established and sufficiently clear right in October 1985. *Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1982).

Because the rights alleged met the *Harlow-Anderson* criteria, defendant's qualified immunity defense should have failed.

II. One of the particularized rights which plaintiff alleged defendant violated, to not have a federal official maliciously sabotage his reputation and career by intentionally publishing false information, includes malice as one of its components. *Wilkes v. Dinsman*, 7 How. 86, 128, 12 L. Ed. 618, 636 (1849); *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). Plaintiff did not allege just "bare allegations of malice," independent of a clearly established constitutional right, as the plaintiff did in *Harlow*. Rather, he alleged malice along with an established constitutional tort and, therefore, he should have been allowed to proceed with discovery on that and other issues material to his claim.

III. The circuit's insistence that a heightened pleading standard must be applied prior to discovery in a *Bivens* claim where malice has been alleged reflects the worst aspects of pleading under the common law.

Although the Advisory Committee on the Federal Rules had the option of amending Rules 8 and 9 to reflect a heightened pleading standard for civil rights claims where malice has been alleged, that Committee chose to amend Rule 11, for example, and not Rules 8 or 9 in 1983, in order to further discourage frivolous claims. The heightened pleading standard applied at the pre-discovery juncture impermissibly undermines this and other considered decisions of those charged with drafting and amending the Federal Rules.

IV. Discovery is permitted in civil rights suits where immunity has been raised as a defense. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Anderson v. Creighton*, 483 U.S. 635 (1987). But the application of a heightened pleading standard to the allegations of rights asserted *prior* to discovery is just simply wrong. It is only after sufficient discovery has taken place that the application of a heightened pleading standard to a Rule 56 motion is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Prior to discovery and where the parties' claims are different, it is the notice and general pleading standards of Rules 8(a)(2) and 9(b) that must be met. Whether defendant acted with malice, whether the information communicated was false, and whether the act being challenged was discretionary or ministerial demonstrate material differences in the parties' claims, and plaintiff's allegations, including circumstantial allegations of malice, *Village of Arlington Heights v. Metropolitan Housing Development*

Corp., 429 U.S. 266 (1977); *Holland v. United States*, 348 U.S. 121 (1954); *Melton v. City of Oklahoma City*, 879 F.2d 706, 716-17 (10th Cir. 1989); *Springer v. Seaman*, 821 F.2d 871, 879 (1st Cir. 1987); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1255-56 (7th Cir. 1984), more than satisfied the pleading requirements under Rules 8(a)(2) and 9(b). *Conley v. Gibson*, 355 U.S. 41 (1954). Thus, discovery should have proceeded prior to the application of a heightened pleading standard.

V. Assuming that the circuit's heightened pleading standard was appropriately applied pre-discovery, plaintiff's allegations, which must be taken as true, were more than sufficient, including allegations circumstantially showing malice, *Village of Arlington Heights; Holland; Melton; Springer;* and *Bell*, to show even prior to discovery that there were material facts – whether defendant had acted with malice, whether his act was ministerial and whether the communication was false – which were genuinely in dispute and that a reasonable jury could find on the basis of the allegations made that plaintiff should win his case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Therefore, the summary judgment motion should have been denied.

VI. Assuming defendant was engaged in a task within his authorized duties, a material fact was nevertheless in dispute as to whether responding to the Credential Information Request Form was ministerial or discretionary in nature. As plaintiff has asserted, a response to the Form called for a function which was not the product of independent judgment. *Westfall, et al. v. Erwin*, 484 U.S. 292, 296 (1988). On the other hand, defendant claimed that the response called for a discretionary "reference." Whether

defendant acted ministerially or discretionarily was genuinely in dispute, was a material fact and was a condition precedent to the ultimate question as to whether defendant could successfully claim the protection of the qualified immunity defense. *Westfall, et al. v. Erwin*, 484 U.S. at 299-300; *Harlow*, 483 U.S. at 816. Consequently, defendant's summary judgment motion should have been denied. *Westfall*, 484 U.S. at 300.

ARGUMENT

I. ON A SUMMARY JUDGMENT MOTION IN A *BIVENS* CLAIM IN WHICH MALICE HAS BEEN ALLEGED AND WHERE A QUALIFIED IMMUNITY DEFENSE HAS BEEN RAISED, THE CIRCUIT'S HEIGHTENED PLEADING STANDARD WAS INAPPROPRIATELY APPLIED PRIOR TO DISCOVERY.

Generally, government officials performing discretionary functions within the outer perimeters of their duties are shielded from liability if their conduct does not violate clearly established statutory or constitutional rights about which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Formulated in a case in which discovery went on for seven years, the general rule, later narrowed and refined, encompasses the policy that public officials should not be subjected to the costs of trial or to the burdens of broad-reaching discovery, *Harlow*, 457 U.S. at 818, unless:

> " . . . [T]he right the official is alleged to have violated . . . [has] been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected . . . unless the very action in question has previously been held unlawful . . . but it is to say that in the light of preexisting law the unlawfulness must be apparent."

Anderson v. Creighton, 483 U.S. 635, 640 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 535, n. 12 (1985).

The circuit's heightened standard is a rule of pleading which was inappropriately applied pre-discovery. Even by this standard, however, it is more than apparent that plaintiff alleged clearly established rights which were sufficiently clear so that a reasonable official in defendant's position in October 1985 would have understood what he had done was wrong.

A. THE RIGHTS WHICH PLAINTIFF ALLEGED WERE CLEARLY ESTABLISHED IN OCTOBER 1985.

Even assuming,[5] without conceding, that the act which plaintiff challenged was a subjective, candid response to a solicited request for a reference, plaintiff alleged two clearly established rights protected by substantive due process guarantees.

Independent of malice, plaintiff alleged that he should be constitutionally protected from a federal official who vilified plaintiff's reputation and ruined his professional career. Under *Paul v. Davis*, 424 U.S. 693

[5] But see, *infra*, ¶ II.

(1976), and, more particularly, *Anderson v. Creighton*, 483 U.S. at 640, under *Doe v. United States Dep't. of Justice*, 753 F.2d 1092 (D.C.Cir. 1985) and *Bartel v. F.A.A.*, 725 F.2d 140 (D.C.Cir. 1984), the district court determined that the right plaintiff had asserted was clearly established in October 1985 within the meaning of *Harlow* and *Anderson*. Although the circuit court agreed that *Doe* and *Bartel* established a liberty interest which warranted constitutional protection, App. 16a, the court nevertheless reversed because the "very action in question," *Anderson*, 483 U.S. at 640, which plaintiff had alleged had not "previosuly been held unlawful." *Id.*

In the careful balance struck in *Anderson*, it was established that so long as the "contours of the rights [alleged] are sufficiently clear," *Anderson*, 483 U.S. at 640, and the unlawfulness is "apparent," *id.*, rights will constitutionally be protected if they were clearly established at the time the challenged act took place.

The right plaintiff alleged met the *Anderson* test head-on. In *Bartel*, the defamatory letter at issue was unsolicited, and in *Doe*, the plaintiff was terminated from her job amid claims that she was dishonest and unprofessional. Here, the majority considered that the defamatory letter was a "reference" sent by a past employer in response to a "request" from a future employer. App. 16a. Therefore, what is an insignificant variance in these facts when compared to *Doe's* and *Bartel's* made the contours of the right established in those cases "unclear" in the majority's estimation. The types of factual discrepancies which distinguish plaintiff's case from *Doe's* and *Bartel's*, however, are precisely the kind which *Anderson* warned should not be used in order to protect unlawful official action.

Thus, under *Doe* and *Bartel*, plaintiff's allegations stated a clearly established right which was sufficiently clear to have made it apparent to a reasonable official in defendant's position that what he did was unlawful. *Anderson*, 483 at 640; *Harlow*, 457 U.S. at 817-818. Therefore, defendant's qualified immunity claim should have been denied.

With malice as a part of the constitutional tort asserted, the stigma-plus test established by *Paul v. Davis*, 424 U.S. 693, 711-712 (1976), provides a second basis for plaintiff's claim.

Plaintiff's allegations were sufficiently particularized to state a "stigma-plus" injury which is constitutionally protected. *Paul v. Davis*, 424 U.S. at 711-712. In addition, he alleged not "mere allegations of malice," *Harlow*, 457 U.S. at 817, but rather malice as an element of the underlying constitutional tort which had been established by *Paul* ten years before. *Wilkes v. Dinsman*, 7 How. 86, 128, 12 L. Ed. 618, 636 (1849); *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Paul v. Davis*, 424 U.S. at 711-712; *Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1982).[6] Thus, a stigma-plus, plus malice right which was clearly established in October 1985 served as another basis for denying defendant's qualified immunity claim.

Because each of the rights which plaintiff asserted were clearly established and sufficiently particularized in October 1985, a reasonable official in defendant's position

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[6] Alternatively, this right may be viewed as one which includes malice within the penumbra of the stigma-plus test established by *Paul*.

would have known his act was wrong. Accordingly, defendant should not have been permitted to use the shield of a qualified immunity defense to defeat plaintiff's claim.[7]

B. MALICE IS AN ELEMENT OF A RIGHT PLAINTIFF ALLEGED.

Malice by a federal official is malice, whether in a university, on the high seas, or in public hospitals. Whatever the context, the principle is the same: public employees expect and have a right to fair and honest treatment by officials with more power than they.

The adjustment of the "good faith" defense in *Harlow* did not eliminate malice from constitutional tort litigation. Rather, it was determined that the subjective arm of qualified immunity analysis, *Wood v. Strickland*, 420 U.S. 308, 322 (1975), could no longer be used as an independent basis for suing a federal official. *Harlow*, 457 U.S. at 815-16. Thus, *Harlow* made clear that only *Wood v. Strickland's* objective, "reasonable official" standard could from then on in be applied in order to determine whether a qualified immunity defense could defeat a *Bivens* claim.

Accordingly, where malice is an element of the underlying constitutional tort, as it was in one of the rights plaintiff asserted here, a party is entitled to allege such malice and to obtain discovery with respect to that

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[7] And as the district court observed, rights which may have been established under the provisions of 18 U.S.C. § 1001 also could have served to put a reasonable official in defendant's position on notice that what he was doing was wrong.

and other elements material to that right. Unlike *Harlow*, where the plaintiff alleged "bare allegations of malice," *Harlow* 457 U.S. at 817, in an attempt to defeat qualified immunity where the law was not clearly established, the plaintiff here alleged malice along with a clearly established right.

That malice may be a part of a right which may defeat an immunity claim was recognized more than a century ago. In 1836, on board a ship in service to the United States Navy, a marine had been thrown into the ship's brig, had been lashed, had been shackled and had otherwise been punished for refusing to follow orders when he thought, wrongly, that his enlistment time was up. Several years later, upon returning to the mainland, he sued his commanding officer for assault and other torts, none of which contained allegations of malice. The captain raised, as his defense, official immunity. On a writ of error it was held:

> " . . . [I]n respect to those compulsory duties . . . while arduously endeavoring to perform them in such a manner as might advance the science and commerce and glory of his country, rather than his own personal designs, a public officer, invested with certain discretionary powers, never has been, and never should be, made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty."

Wilkes v. Dinsman, 7 How. 86, 128, 12 L. Ed. 618, 636 (1849).

If malice had been alleged, *Wilkes* would have otherwise been decided. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Perry v. F.B.I.*, 781 F.2d 1294, 1304 (7th Cir.

1986) (concurring opinion, Posner, J.) (the qualified privilege is forfeited if the defendant acts in bad faith); *Richardson v. Chevrefils*, 552 A.2d 89, 94-96 (N.H. 1988). Thus, where malice is asserted as a part of a right which is established and clear and constitutionally protected, a claim of qualified immunity must be denied.

C. THE HEIGHTENED PLEADING STANDARD WAS INAPPROPRIATELY APPLIED PRIOR TO DISCOVERY.

By its very terms, and as it has been interpreted, Rule 56 provides that prior to final disposition on a summary judgment motion appropriate discovery should have taken place, including in civil rights claims, *Mitchell v. Forsyth*, 472 U.S. at 526 (. . . the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue. . . . "); *Anderson v. Creighton*, 483 U.S. 646-647, n. 6 (" . . . if the actions Anderson claims he took are different from those the Creightons allege . . . then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved."), and particularly when state of mind is at issue. Wright & Miller & Kane, Federal Practice & Procedure: Civil 2d § 2730 (1983) ("Since the information relating to state of mind generally is within the exclusive knowledge of one of the litigants and can be evaluated only on the basis of circumstantial evidence, the other parties normally should have an opportunity to engage in discovery before a summary judgment is rendered. . . . "). Therefore, where the parties have had the opportunity to conduct discovery, a heightened pleading standard is appropriate. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 256-257 (1986). Until discovery has taken place, however, and where the parties' claims are different, the pleadings must be measured against the notice and pleading requirements of Rules 8(a)(2) and 9(b) in order to withstand dismissal.

That plaintiff's and defendant's positions are different cannot be denied. Defendant claims that the act being challenged was discretionary but plaintiff claims it was ministerial; plaintiff claimed that defendant acted with malice but defendant implied he did not; and plaintiff asserted that the statement was false but defendant implied it was true. Thus, since the parties' claims conflict and since discovery had not taken place, pleading standards of Rules 8(a)(2) and 9(b), and not of Rule 56, should have been applied.

D. PLAINTIFF'S ALLEGATIONS MET THE APPROPRIATE PRE-DISCOVERY PLEADING STANDARDS OF RULES 8(a)(2) AND 9(b).

The objective of the provisions of Rule 8, the "keystone" of the system of pleading embodied in the federal rules, is to give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Conley v. Gibson*, 355 U.S. 41, 47 (1957); Wright & Miller, Federal Practice & Procedure: Civil 2d §§ 1201, 1202 (1990). Despite occasional concerted efforts to alter the Rule's "notice" pleading requirement to one of "fact," its terms have remained substantially the same since 1938. In 1955, for example, the Advisory Committee on the Federal Rules prepared a Note, *Nagler v. Admiral Corp.*, 248

F.2d 319, 324 (2d Cir. 1957), which shows that the Committee "definitively" rejected all suggestions requiring use of the concept of "facts" and "causes of action" in connection with the pleading process. Wright & Miller, Federal Practice & Procedure: Civil 2d § 1201 (1990). Thus, the language of the Rule has not changed and its meaning has not altered since its inception. *Conley v. Gibson*, 355 U.S. at 47; *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); Wright & Miller, Federal Practice & Procedure: Civil 2d § 1201, n. 11 (1990).

Rule 9(b) was "very probably," *Love v. Commercial Casualty Co.*, 26 F. Supp. 481, 482 (D.C.Miss. 1939), based on Order xix, Rule 22, Supreme Court of England. *Sargeaunt v. Cardiff Junction Dry Dock Co., Ltd.*, The Weekly Notes, 263 (August 14, 1926). Order xix, Rule 22, a general pleading provision, was subsequently amended, so that in England, malice and other conditions of the mind, like fraud, must now be pleaded with particularity. Wright & Miller, Federal Practice & Procedure: Civil 2d § 1300, n. 2 (1990).

Rule 9(b) can only be read in combination with Rule 8(a)(2), Wright & Miller, Federal Practice & Procedure: Civil 2d § 1298 (1990), but even on its own, its meaning is crystal clear: when "malice, intent, knowledge and other condition of mind" are pleaded, they may be generally alleged "as a fact without setting out the circumstances from which it is to be inferred." 25 Halsbury's Law of England, 2d Edition 277.

With undoubted knowledge of the amendment to England's Rule 9(b) counterpart, being aware of the problem that frivolous lawsuits have created, and having had ample

opportunity to amend the rules to require pre-discovery heightened pleading standards for civil rights claims where malice is alleged, the Advisory Committees on the Federal Rules nevertheless have left Rules 8 and 9 intact.[8]

Although plaintiff could have alleged malice merely in notice and general pleading terms, he in fact alleged far more. ¶ I. E., *infra*. Thus, his assertions were more than adequate to meet the Rule 8(a)(2) and 9(b) requirements that he state in notice and general pleading terms the basis of his claim for relief. *Conley v. Gibson*, 355 U.S. at 47. Therefore, plaintiff's case should not have been dismissed. Rather, unencumbered by an inappropriately applied rule of pleading, discovery consistent with the nature of plaintiff's claim should have been allowed to proceed. *Mitchell v. Forsyth*, 472 U.S. at 526; *Anderson v. Creighton*, 483 U.S. at 646-647, n. 6.

E. ASSUMING THAT THE CIRCUIT'S HEIGHTENED-PLEADING-WITH-NO-DISCOVERY STANDARD WAS APPROPRIATELY APPLIED, PLAINTIFF'S ALLEGATIONS SUFFICIENTLY SATISFIED THAT STANDARD EVEN PRIOR TO DISCOVERY.

Plaintiff alleged sufficient facts, even prior to discovery, to comply with a heightened pleading standard which must be met when opposing a Rule 56 motion,

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[8] In 1983, for example, and to discourage frivolous lawsuits, the Advisory Committee on the Federal Rules chose to amend Rule 11, and not Rules 8 and 9.

Anderson v. Liberty Lobby, Inc., 477 U.S. at 248, and plaintiff's allegations were more than sufficient so that a reasonable jury could have returned a verdict for him. *Id.*

In his complaint and in opposition documents, plaintiff alleged that defendant's statement was false, that he had acted outside of the outer perimeters of his authority in "responding" to the Form and that the task defendant should have performed was purely ministerial in nature. His circumstantial allegations of malice, which must be viewed no differently than allegations which are direct, *Holland v. United States*, 348 U.S. 121, 139-140 (1954); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) (constitutionally impermissible motivations may be established by circumstantial evidence); *American Communications Ass'n. v. Douds*, 339 U.S. 382, 411 (1950) (circumstantial evidence may be indispensable because it is unlikely that direct evidence of state of mind will be available), were also sufficient to satisfy the heightened pleading rule. See also *Melton v. City of Oklahoma City*, 879 F.2d 706, 716-17 (10th Cir. 1989) (in *Bivens* claims, circumstantial evidence may be used to prove state of mind); *Springer v. Seaman*, 821 F.2d 871, 879 (1st Cir. 1987) (same); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1255-56 (7th Cir. 1984) (same).

Defendant claimed plaintiff was "inept;" plaintiff alleged he had always received exemplary evaluations at Saint Elizabeths. On this issue alone, and taking plaintiff's allegations as true, a reasonable jury could justifiably infer and reasonably conclude that defendant had acted maliciously. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255; App. 24a-25a.

Plaintiff also made other allegations from which a reasonable jury could infer malice:

1. Defendant failed to respond to what the Form actually requested.

2. The language defendant used was "extreme" which "inherently casts doubt on defendant's neutrality." App. 24a-25a.

3. Plaintiff alleged that there were conflicts with defendant as to how the behavior modification program should be run. App. 24a-25a.

4. Plaintiff alleged that defendant resented plaintiff's absence for several months. App. 24a-25a.

Taken together, plaintiff's allegations, including those of malice, satisfied a heightened standard of pleading which shows that there were material facts genuinely at issue and that a reasonable jury could find defendant liable. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. Therefore, defendant's motion for summary judgment should have been denied.

II. A FEDERAL OFFICIAL MAY NOT BE ENTITLED TO QUALIFIED IMMUNITY WITHOUT REGARD TO WHETHER THE CHALLENGED CONDUCT WAS DISCRETIONARY IN NATURE.

In its February 1989 opinion, the majority determined that it was irrelevant to the issue of qualified immunity whether the "evaluation sought . . . was 'subjective' or 'objective,' App. 16a, that is, whether it was ministerial or discretionary in nature. The majority's view is erroneous. Whether a qualified immunity defense has merit depends not only upon whether an official acted within the scope of his duties. A finding must also be made to ascertain

whether the conduct itself was discretionary. *Westfall, et al. v. Erwin*, 484 U.S. at 295; *Harlow*, 457 U.S. at 816, 818.

Assuming, without conceding, that the defendant was acting within the outer perimeters of his duties, whether an official's act is ministerial or discretionary depends upon the nature of the function the official was asked to perform. *Westfall*, 484 U.S. at 296, n. 3; *Forrester v. White*, 484 U.S. 224, (1988); *Harlow*, 457 U.S. at 810-813. Thus, when the function an official is asked to perform is not the product of independent judgment, the act is deemed to be ministerial. Therefore, the act is not protected by qualified immunity. *Westfall*, 484 U.S. at 296-97.

Saint Elizabeths was asked to respond to a Credential Information Request Form. Signed by plaintiff, the Form authorized the release of "all information on job performance and credentials," terms of bureaucratic art, and information which was discreet and already in existence. Thus, the "level of discretion," *Westfall*, 484 U.S. at 297, involved in responding to the Form was nil. For each of the years during which plaintiff had been employed at Saint Elizabeths he had received periodic job performance ratings of particular evaluative gradations. His personnel file also contained documents noting the privileges or "credentials" he had received as a psychologist. Therefore, responding to the Form involved a purely administrative function of locating, copying and sending documents referred to by the Form.

Whether defendant enjoyed qualified immunity from suit for the performance of this function is to some degree dependent upon whether Army personnel would be immune from suit when it "ordered" the information for

its records. *Westfall*, 484 U.S. at 297, citing *Doe v. McMillan*, 412 U.S. 306, 323-24 (1973). Ordering the information as opposed to evaluating it once it was received was an act which involved no discretion whatever. Responding to the Form by sending documents to which it referred took a similar, and less than minimal, level of discretion. At most, someone may have had to exercise "some modicum of choice," *Westfall*, 484 U.S. at 298, in ministerially locating the job performance ratings and credentialing documents in plaintiff's file, not what to discretionarily state in those documents.

In opposition to defendant's motion, plaintiff argued that responding to the Form was a ministerial task. May 6, 1987 Memorandum of Points and Authorities In Support of Plaintiff's Opposition To Defendant's Motion To Dismiss or Alternatively For Summary Judgment, at 7-8. He also alleged that defendant was a "low-level, non-policy-making supervisor." J.A. 18. Defendant, on the other hand, urged that a response to the Form called for a subjective, discretionary "reference." J.A. 12.

Therefore, defendant's motion should have been denied since a material fact, whether defendant's act was discretionary or ministerial, was genuinely in dispute. *Westfall*, 484 U.S. at 299.

CONCLUSION

On a summary judgment motion where qualified immunity has been raised as a defense, the circuit's heightened-pleading-with-no-discovery standard should not be permitted to thwart appropriately pleaded *Bivens* claims where malice is alleged, and whether a challenged act is discretionary may not be disregarded prior to determining whether a federal official is qualifiedly immune from suit.

Accordingly, the judgment of the court of appeals should be reversed with instructions to remand the case to the district court for discovery and trial on the merits.

Respectfully submitted,

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No. 90-96

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

FREDERICK A. SIEGERT,

Petitioner

v.

H. MELVYN GILLEY,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, in the militia, when in actual service in time of war or public danger; nor shall any person be subject

for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 8, Federal Rules of Civil Procedure. General Rules of Pleading:

(a) Claims For Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs

or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader, does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure To Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency. (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one

of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of the consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Rule 9, Federal Rules of Civil Procedure. Pleading Special Matters:

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have

occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasijudicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

Rule 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together, with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain

what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party's response may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may

order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the Court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney my [sic] be adjudged guilty of contempt.

Supreme Court, U.S.
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CLERK

No. 90-96

In the Supreme Court of the United States

OCTOBER TERM, 1990

FREDERICK A. SIEGERT, PETITIONER

v.

H. MELVYN GILLEY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. In a *Bivens* action based on a federal official's alleged malice, once the official has raised the defense of qualified immunity, may the court require the plaintiff to support his claim with more than conclusory allegations in order to proceed with the litigation?

2. In this *Bivens* action based on a federal official's response to a reference request by the plaintiff's prospective employer, is the official entitled to the defense of qualified immunity?

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In the Supreme Court of the United States

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No. 90-96

FREDERICK A. SIEGERT, PETITIONER

v.

H. MELVYN GILLEY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 5a-25a) is reported at 895 F.2d 797. The decision of the district court (Pet. App. 27a-52a) is reported at 692 F. Supp. 1406.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1990. A petition for rehearing was denied on April 16, 1990. Pet. App. 2a-4a. The petition for a writ of certiorari was filed on July 13, 1990, and was granted on October 15, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be * * * deprived of life, liberty, or property, without due process of law."

Rules 8, 9, and 56 of the Federal Rules of Civil Procedure are set forth in the appendix to petitioner's brief, Br. App. 2a-8a.

STATEMENT

1. Petitioner is a clinical psychologist who was employed at St. Elizabeth's Hospital (then a federal government facility in Washington, D.C.) from November 1979 to October 1985. During 1985, petitioner was a supervisory psychologist in the hospital's Godding/Noyes Division, which treated patients needing behavior therapy. J.A. 14, 19; Pet. App. 7a-8a. Beginning in February 1985, petitioner "had to take a considerable amount of medical leave time off from work." J.A. 19. Although the hospital's records noted that petitioner was "AWOL" during that period, *i.e.*, absent without leave, petitioner alleges that those records were inaccurate, since he has "been fully compensated for that time." J.A. 19; see pp. 7-8, *infra*.

Petitioner alleges that respondent—the director of the Godding/Noyes Division and his immediate supervisor during 1985—"resented [his] being away from work for the length of time [he] was[,] since [his] absence created additional burdens for [respondent]." J.A. 20. Petitioner concedes that he "resist[ed] * * * [respondent's] attempts to modify some aspects of the behavior modification program that had been in operation for several years," claiming that respondent "knew almost nothing about behavior therapy." J.A. 20. Petitioner further alleged that respondent "resented [that] resistance." J.A. 20; see also J.A. 5-6 (Compl. ¶ 6).

In August 1985, Betty Humphrey, Director of the Godding/Noyes Division, notified petitioner that the Department of Health and Human Services (the agency in charge of the hospital) was proposing to fire him. Humphrey told petitioner that "his proposed removal was based upon his inability to report for duty in a dependable and reliable manner, his failure to comply with supervisory directives, and cumulative charges of absence without approved leave." J.A. 15; see J.A. 21. After a meeting with hospital administrative personnel, petitioner resigned from his position on October 1, 1985, before the proposed removal became final. In so doing, petitioner avoided having a "letter of 'removal' " placed in his personnel file. J.A. 21; see Pet. App. 33a.

Soon after his resignation from St. Elizabeth's, petitioner began working as a clinical psychologist at a United States Army hospital in Bremerhaven, West Germany. J.A. 20-21. In order to treat patients at the hospital, petitioner needed to receive "credentials" from the Army Medical Department Credentials Committee. As part of that process, petitioner submitted a "Credential Information Request Form" to St. Elizabeth's Hospital, requesting that the hospital "send [to petitioner's current hospital supervisor in West Germany] all information on job performance and the privileges granted while [he] was a member of [the] staff." Pet. App. 55a.[1] Dr. Stammeyer, the Director of Psychology at St. Elizabeth's, referred petitioner's request to respondent, because petitioner "had been under

[1] Petitioner's supervisor at the Bremerhaven Army hospital was Colonel William Smith, the Deputy Commander for Clinical Services, who also served as chairman of that hospital's Credentials Committee. Pet. App. 34a.

[his] supervision when [petitioner] worked at [the hospital]." J.A. 15.

On October 23, 1985, in response to petitioner's request, respondent notified the Army by letter that "he could not recommend [petitioner] for privileges as a psychologist." J.A. 6 (Compl. ¶ 10). In that letter, respondent wrote that he "consider[ed] [petitioner] to be both inept and unethical, perhaps the least trusthworthy individual I have supervised in my thirteen years at [St. Elizabeth's Hospital]." J.A. 6 (Compl. ¶ 11).[2] In late November, the Army Credentials Committee told petitioner that since "reports about him were 'extremely unfavorable,' * * * the committee was * * * recommending that [petitioner] not be credentialed." J.A. 7 (Compl. ¶ 12). At this time, petitioner first learned of respondent's recommendation letter. J.A. 7 (Compl. ¶ 13); see Pet. App. 35a.

As a result of the Committee's notification, petitioner hired an attorney to assist him in presenting his case to the Army Commander. In January 1986, petitioner "was credentialed" by the Commander. J.A. 7 (Compl. ¶ 15).[3] In July 1986, petitioner left his position at the Bremerhaven Army Hospital and "was hired as a clinical psychologist at another army hospital in Stuttgart, West Germany." J.A. 7 (Compl. ¶ 17) When petitioner reported

[2] Respondent's letter was made part of the record as an exhibit attached to the affidavit of Dr. Stammeyer. See J.A. 15. On respondent's motion, the district court placed the letter under seal. Order, *Siegert* v. *Gilley*, No. 86-3234 (D.D.C. Nov. 24, 1987); see Pet. App. 34a.

[3] According to petitioner, "[n]otwithstanding the Commander's action, * * * [his Bremerhaven supervisor] threatened to 'get' [petitioner] in any event, and otherwise made [his] work environment difficult, unpleasant, and extremely stressful." J.A. 7 (Compl. ¶ 16). The supervisor's "attitude * * * had been formulated by [respondent's] statement [about petitioner's previous work performance at St. Elizabeth's]." J.A. 7 (Compl. ¶ 17).

for work in Stuttgart, he "was literally turned away and was told that [he] was not wanted because of what they had heard about [him] from Bremerhaven personnel." J.A. 23; see J.A. 7 (Compl. ¶ 18); Pet. App. 35a.

Petitioner thereafter returned to the Bremerhaven Army hospital, where the Army again undertook to review petitioner's credentials. J.A. 7-8 (Compl. ¶ 19). According to petitioner, in the fall of 1986, the Army ultimately granted him credentials to treat adults, but revoked his credentials to treat children. J.A. 22. Petitioner filed administrative appeals with the Office of the Surgeon General to obtain those credentials. During that time, petitioner "worked in the medical library at the Army base hospital." J.A. 22. In December 1987, the Surgeon General denied petitioner's claims. Soon thereafter, petitioner's "federal service employment [was] terminated." J.A. 23; see Pet. App. 35a.[4]

2. In November 1986, petitioner brought this federal court action against respondent, claiming that respondent's letter had caused him to lose his post as a psychologist at the Bremerhaven Army Hospital, and had rendered him unable to obtain other appropriate employment in the field. Pet. App. 35a; J.A. 23. Petitioner alleged that the statements in the letter were "defamatory *per se* and * * * untrue," J.A. 8 (Compl. ¶ 22), and that respondent had made those statements "maliciously and in bad faith," J.A. 8 (Compl. ¶ 21). Relying in part on

[4] Petitioner's complaint, filed in November 1986, alleged only that he was "waiting for a decision from [the] Credentials Committee as to whether [his] credentials will be revoked." J.A. 8 (Compl. ¶ 20). In an amended complaint filed in April 1987 petitioner offered a more complete description of the credentials review process. Amended Compl. ¶ 20. On remand from the court of appeals, the district court dismissed the action in May 1990, without ever ruling on petitioner's motion for leave to file the amended complaint under Fed. R. Civ. P. 15(a).

Bivens v. *Six Unknown Named Narcotics Agents*, 403 U.S. 388 (1971), petitioner sought $4 million in damages against respondent in his individual capacity, contending that respondent—"by maliciously and in bad faith publishing a defamatory *per se* statement * * * which [he] knew to be untrue, or with reckless disregard as to whether it was true or not," J.A. 9 (Compl. ¶ 30)—had violated his rights under the Due Process Clause of the Fifth Amendment to the United States Constitution. See J.A. 4, 8, 9 (Compl. ¶¶ 1, 21, 30).[5]

Respondent thereafter filed a motion to dismiss or in the alternative for summary judgment. Respondent contended that petitioner's factual allegations, even if true, did not

[5] Petitioner also asserted pendent common law tort theories of defamation, intentional infliction of emotional distress, interference with contractual relations, and interference with prospective advantage, J.A. 4, 9-11 (Compl. ¶¶ 2, 31-38).

Respondent sought dismissal of those pendent claims, contending, among other arguments, that he was entitled to absolute immunity from such common law torts. In view of its decision ordering discovery on petitioner's *Bivens* claim, see p. 8, *infra*, the district court did not address respondent's asserted defense. Pet. App. 51a-52a. In May 1989, while respondent's appeal was pending, respondent filed in the district court a motion for reconsideration. In that motion, respondent notified the court that, in view of the recently enacted Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No.. 100-694, 102 Stat. 4563-4567, the United States "is being substituted as the exclusive defendant for [petitioner's] common law tort claims." Resp. Mem. in Support of Mot. to Reconsider at 1-2, *Siegert* v. *Gilley*, No. 86-3234 (D.D.C.); see 28 U.S.C. 2679(d)(1).

The court of appeals did not expressly address petitioner's common law claims, but having determined that his *Bivens* claim failed, reversed the district court's order and remanded with instructions to dismiss the entire case. Pet. App. 19a; see *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966). Petitioner does not challenge the propriety of dismissing his pendent common law claims if this Court otherwise upholds the court of appeals' judgment.

make out a violation of any constitutional right. Respondent also asserted the defense of qualified immunity, contending that petitioner's allegations did not state a violation of any "clearly established" constitutional right within the meaning of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Pet. App. 30a-31a, 36a.[6]

In opposition to respondent's motion, petitioner submitted his affidavit stating, among other things, that "[i]t is my understanding that [respondent] resented my being away from work for the length of time I was since my absence created additional burdens for him." J.A. 20. In further explaining the basis for his allegation that respondent acted with malice, petitioner stated that

> [h]ad [respondent] made a simple inquiry of the Department of Labor's Workman's Compensation Board, for example, he would have discovered that [petitioner] had been fully compensated for the periods during which [respondent] apparently considered him "AWOL" and which apparently was the cause of [respondent's] belief that [petitioner] was "untrustworthy," *inter alia*. That [respondent] failed

[6] Respondent submitted an affidavit of Dr. Stammeyer, see J.A. 14-16, which included as a sealed exhibit a copy of respondent's recommendation letter, see note 4, *supra*, and a statement of material facts not in issue under Local Rule 108(h), see J.A. 12-13.

Respondent also contended that petitioner's action should be dismissed in light of the administrative remedies available to him. See *Bush* v. *Lucas*, 462 U.S. 367 (1983). The district court rejected that defense, concluding that "[t]here is no requirement in the law for [the court] to relegate [petitioner] to an administrative forum, if one actually exists, at this early stage of this litigation." Pet. App. 51a. The court of appeals declined to consider the issue, concluding that its appellate jurisdiction "is limited to the sole question of the district court's rejection of [respondent's] claim of qualified immunity." *Id.* at 10a.

> to make such inquiry * * * and instead responded to a credentials status inquiry in the way he did show malice, a clear lack of good faith and unreasonableness.

Pet. Mem. in Support of Opp. to Resp. Mot. to Dis. at 12 (footnote omitted), *Siegert* v. *Gilley*, No. 86-3234 (D.D.C. (filed May 8, 1987).[7]

3. In December 1987, the district court issued an order declining to "decide this matter on a Summary Judgment motion at this time." Pet. App. 54a. Instead, the court determined that it "would like to see a more developed record," and therefore ordered "a limited amount of discovery," *ibid.* In particular, the court directed that petitioner may depose respondent and Colonel Smith, and then respondent may depose petitioner.[8]

Respondent filed a motion for reconsideration, asking the court to stay further discovery pending disposition of his qualified immunity claim. In June 1988, the district court denied that motion, determining that respondent's "motion to dismiss, or in the alternative, for summary judgment, must be denied at this time." Pet. App. 31a. The court held that petitioner's factual allegations were sufficient to state a due process claim, because it was well established at the time of the events that "a common law defamation is transformed into a constitutional deprivation of liberty when the government is the source of the defamatory allegations and the resulting 'stigma' involves

[7] Petitioner also submitted under Local Rule 108(h) a statement of material facts in issue. See J.A. 17-18. At that time, petitioner also filed an amended complaint, together with a motion for leave to file it. See note 4, *supra*.

[8] Petitioner had not contended that respondent's motion for summary judgment should be denied pending further discovery. Nor had petitioner filed a motion under Fed. R. Civ. P. 56(f) for additional discovery.

'some tangible change of status vis-a-vis the government.' " *Id.* at 44a (quoting *Doe* v. *United States Dep't of Justice*, 753 F.2d 1092, 1108-1109 (D.C. Cir. 1985)). The court therefore directed the parties to proceed with the previously ordered discovery. Pet. App. 52a.

4. The court of appeals reversed and remanded with instructions that the case be dismissed. Pet. App. 5a-25a. The court first determined that, to the extent petitioner's *Bivens* action was premised on allegations of improper conduct irrespective of subjective intent, the allegations did not state a claim for violation of any clearly established constitutional right. *Id.* at 14a-16a. The court pointed out that the fact that petitioner and his new employer, the Army, had solicited the information provided by respondent constituted a significant distinction from existing case law.[9] And the court recognized that a former employer responding to a request for a job reference would have a qualified privilege at common law. *Id.* at 15a-16a.

The court of appeals then turned to petitioner's "central contention * * * that [respondent] wrote the letter with bad faith and malice." Pet. App. 16a. Assuming "that such bad faith motivation would suffice to make [respondent's] actions in writing the letter a violation of [petitioner's clearly established] constitutional rights," *id.* at 16a-17a, the court held that petitioner's allegations of improper motivation were insufficient to overcome respondent's assertion of qualified immunity. The court explained that where, as here, improper purpose is an essential component of a plaintiff's constitutional tort action,

[9] See *Doe* v. *United States Dep't of Justice*, 753 F.2d 1092 (D.C. Cir. 1985) (discharge of government employee accused of misconduct by supervisors); *Bartel* v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984) (former supervisor sent unsolicited references to prospective employer).

the plaintiff must adequately allege specific, direct evidence of illicit intent in order to defeat the defendant's motion to dismiss or motion for summary judgment asserting qualified immunity. *Id.* at 11a-14a, 17a-18a.

Here, the court determined, petitioner's allegations did not satisfy that "heightened pleading standard." Pet. App. 19a. The court stated that

> [t]he complaint's shortcoming is most evident in its allegations that [respondent] had acted in bad faith when he described [petitioner] as inept, unethical, and untrustworthy. * * * It merely asserts (and reasserts) that in making the statement he "knew [it] to be false or [made it] with reckless disregard as to whether it was true."

Id. at 17a (citations omitted). And the court determined that petitioner's affidavit did not

> add anything more tangible to the record than the assertions that prior to the time [respondent] became his supervisor, he had received exemplary job performance ratings, had never had his professional integrity questioned, and that his resistance to certain changes [respondent] wished to make in St. Elizabeth's programs was the source of [respondent's] hostility towards him.

Ibid.

Chief Judge Wald dissented in part. Pet. App. 19a-25a. Although she agreed with the majority that the district court's finding of no qualified immunity should be vacated, *id.* at 19a, she concluded that petitioner's factual allegations were sufficient "to warrant limited discovery before a judicial resolution of the qualified immunity issue," *id.* at 24a.[10]

[10] The court of appeals later denied a petition for rehearing, together with a suggestion of rehearing en banc. Pet. App. 2a-3a. On remand from the court of appeals, the district court dismissed petitioner's action in its entirety on May 7, 1990. Pet. App. 1a.

SUMMARY OF ARGUMENT

The judgment of the court of appeals should be affirmed.

1. The remedy recognized by this Court in *Bivens* and related cases is an important means of vindicating constitutional rights. At the same time, the Court has recognized that the protection afforded to public officials by the doctrine of qualified immunity is essential to the vigorous and effective performance of governmental functions. For that reason, the Court has emphasized that the scope of this immunity embraces more than a defense to personal liability in damages; it is also an "entitlement * * * [to] *immunity from suit*." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985).

The full measure of protection afforded by the immunity doctrine therefore calls for an official's claim of immunity to be resolved as early as possible in the litigation. And since the doctrine protects official conduct unless that conduct violates a "clearly established" constitutional right, a plaintiff must support his allegations of wrongdoing—once a defense of immunity has been raised—with more than conclusory allegations. Because the Court has made it clear (in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982)) that the test for determining the availability of immunity is an objective one, not turning on the official's motivation, it could well be that a *Bivens* remedy does not lie when the official's state of mind is an essential element of the violation itself. Lower courts have not taken this view, however; they have struck the balance by insisting that in such a case, the raising of an immunity defense requires—for the litigation to continue—that the plaintiff support his allegation of improper motive with sufficient

precision and factual specificity to raise a genuine issue as to the lawfulness of the official's conduct. If such suits are to be allowed, we believe that such an approach is necessary to maintain the viability of the immunity defense and to safeguard the values it implements.

The Federal Rules of Civil Procedure do not preclude the imposition of such a requirement. First, the mandate of Rule 8—that a plaintiff make a "short and plain statement of the claim" showing that he is "entitled to relief"—means in this context that once the defendant has raised his immunity defense, the plaintiff is not "entitled to relief" (or indeed to proceed with the litigation at all) unless he can make a sufficient showing to overcome the immunity defense.

Second, while the provision in Rule 9(b) allowing malice or other condition of mind to be "averred generally" permits the plaintiff to plead the defendant's motivation in general terms in his original complaint, the landscape changes significantly once an immunity defense is raised and the defendant moves for judgment. If, as here, the motion is one for summary judgment, the adequacy of the plaintiff's showing is judged not under Rule 9 but under the summary judgment provisions of Rule 56. Moreover, whether the defendant's motion is one for dismissal (under Rule 12) or for summary judgment (under Rule 56), the substantive scope of the protection afforded by the immunity doctrine requires a specific factual showing in order for the litigation to proceed. To the extent that the provisions of Rule 9 are seen as inconsistent with this requirement, the Rules Enabling Act itself, 28 U.S.C. 2072(b), stipulates that the rule must give way to the demands of the substantive law underlying the immunity doctrine.

In this case, petitioner's conclusory allegations of malice are not sufficient to overcome respondent's claim of qualified immunity. Petitioner relies on the following: his assertion that respondent criticized his work when he received exemplary evaluations from others; an inaccurate portrayal of the solicitation received from petitioner's new employer; claimed "conflicts" with respondent on the proper conduct of the work; and an unsupported allegation that respondent "resented" petitioner's absence for several months. As the court of appeals recognized, none of these assertions, singly or in combination, constitutes a sufficient showing of malice to allow the litigation to proceed.

2. Since respondent acted in the performance of a discretionary function, his conduct is plainly within the scope of the qualified immunity defense. Providing information to a present or prospective employer about the job performance of a subordinate employee necessarily entails judgments and discretion, and petitioner does not (and cannot) allege that respondent acted contrary to any statutory or regulatory directive.

ARGUMENT

I. IN A *BIVENS* ACTION BASED ON A FEDERAL OFFICIAL'S ALLEGED MALICE, ONCE THE OFFICIAL HAS RAISED THE DEFENSE OF QUALIFIED IMMUNITY, THE COURT MAY REQUIRE THE PLAINTIFF TO SUPPORT HIS CLAIM WITH MORE THAN CONCLUSORY ALLEGATIONS IN ORDER TO PROCEED WITH THE LITIGATION

A. The Doctrine Of Qualified Immunity Mandates Prompt Resolution Of The Asserted Defense In Order To Maintain The Balance Between Remedying Violations Of Federal Law And Safeguarding Effective Government

1. In *Bivens* v. *Six Unknown Named Narcotics Agents*, 403 U.S. 388 (1971), this Court "established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an

award of monetary damages against the responsible federal official." *Butz* v. *Economou*, 438 U.S. 478, 504 (1978); see *Carlson* v. *Green*, 446 U.S. 14, 18 (1980); *Davis* v. *Passman*, 442 U.S. 228, 245 (1979). As the Court has explained, "[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982); *Bivens*, 403 U.S. at 410 ("For people in Bivens' shoes, it is damages or nothing.") (Harlan, J., concurring in the judgment).

Nonetheless, in fashioning a limited form of damages remedy, the Court has been mindful of "the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability." *Scheuer* v. *Rhodes*, 416 U.S. 232, 239 (1974); see also *Barr* v. *Matteo*, 360 U.S. 564, 569-576 (1959); *Kendall* v. *Stokes*, 44 U.S. (3 How.) 87, 98 (1845). The need for such substantive protection from suit stems from

> two mutually dependent rationales: (1) the injustice * * * of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Scheuer, 416 U.S. at 240 (footnote omitted). As a result, the Court's "decisions consistently have held that government officials are entitled to some form of immunity from suits for damages." *Harlow*, 457 U.S. at 806; see, *e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

As this Court has explained,

> [i]mplicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.

Scheuer, 416 U.S. at 242. Such immunity, the Court has emphasized, "is not a badge of honor or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." *Barr* v. *Matteo*, 360 U.S. at 572-573. To deny such protection altogether would "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Harlow*, 457 U.S. at 814 (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), cert. denied, 339 U.S. 949 (1950)).

2. With respect to the substantive immunity accorded "executive officials in general," the Court has made plain that "qualified immunity represents the norm." *Harlow*, 457 U.S. at 807; see, *e.g.*, *Butz*, 438 U.S. at 504-508. That immunity shields "government officials performing discretionary functions * * * from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818.

Such protection, however, is "not limited to liability for money damages." *Forsyth*, 472 U.S. at 526. To the contrary, this Court has stressed that the substantive doctrine provides immunity from suit itself, namely, "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Ibid.* (quoting *Harlow*, 457 U.S. at 816). In other words, "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability; and like

an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Forsyth,* 472 U.S. at 526.

For that reason, this Court has made clear that the substantive protection of qualified immunity "should be resolved at the earliest possible stage of a litigation." *Anderson* v. *Creighton,* 483 U.S. 635, 646 n.6 (1987). Indeed, until the "threshold immunity question is resolved, discovery should not be allowed." *Harlow,* 457 U.S. at 818. As this Court recently reiterated, "[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Forsyth,* 472 U.S. at 526; see *Creighton,* 483 U.S. at 646 n.6 (if the complaint alleges actions a reasonable officer could have believed lawful, then the case should be dismissed "prior to discovery").

B. Once The Federal Official Raises The Defense Of Qualified Immunity, The Plaintiff Must Support His *Bivens* Action With More Than Conclusory Allegations In Order To Proceed With The Litigation

1. Under the doctrine of qualified immunity recognized by this Court, once a government official asserts that defense, the plaintiff in a *Bivens* action must either make a sufficient factual showing to negate the immunity or face dismissal of the action. This Court's explanation of the scope of the substantive protection—"[t]he entitlement [to] an *immunity from suit,*" *Forsyth,* 472 U.S. at 526—mandates such a straightforward approach. See *Elliott* v. *Perez,* 751 F.2d 1472, 1483 (5th Cir. 1985) (Higginbotham, J., concurring).

This Court has stressed that a plaintiff's allegations in a *Bivens* action must not only state a claim under the Constitution, but must also "state a claim of violation of clearly established law." *Forsyth,* 472 U.S. at 526. If a plaintiff's

allegations—as stated in the complaint or as supplemented in response to the immunity defense—do not state such a cognizable claim, then "a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Ibid.* "Until this threshold immunity question is resolved," the Court has instructed, "discovery should not be allowed." *Harlow,* 457 U.S. at 818. Indeed, the Court has recognized that "many [*Bivens*] cases may be disposed of without the necessity of pretrial discovery proceedings." *Cleavinger* v. *Saxner,* 474 U.S. 193, 208 (1985).

To ensure that the purposes of qualified immunity are effectuated, the lower courts have consistently required that once immunity is asserted, the plaintiff must set forth his allegations with sufficient precision and factual specificity to negate the claim of immunity.[11] Such a requirement enables the court to determine the threshold issue of qualified immunity before the defendant is forced to endure the burdens of discovery and further proceedings. Requiring factual specificity therefore protects the defendant's "entitlement [to] an *immunity from suit,*" *Forsyth,* 472 U.S. at 526, and furthers the Court's directive that "[u]ntil [the] threshold immunity question is resolved, discovery should not be allowed," *Harlow,* 457 U.S. at 818. Indeed, to allow general or otherwise conclusory

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[11] See, *e.g., Sawyer* v. *County of Creek,* 908 F.2d 663, 665-667 (10th Cir. 1990); *Dunbar Corp.* v. *Lindsey,* 905 F.2d 754, 763 (4th Cir. 1990); *Nieto* v. *San Perlita Indep. School Dist.,* 894 F.2d 174, 177-178 (5th Cir. 1990); *Nuclear Transport & Storage, Inc.* v. *United States,* 890 F.2d 1348, 1355 (6th Cir. 1989), cert. denied, 110 S. Ct. 1807 (1990); *Brown* v. *Frey,* 889 F.2d 159, 170 (8th Cir. 1989), cert. denied, 110 S. Ct. 1156 (1990); *Hobson* v. *Wilson,* 737 F.2d 1, 29 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985).

allegations to satisfy the threshold immunity inquiry would transform the "guarantee of immunity into a rule of pleading." *Creighton,* 438 U.S. at 639.

2. Similarly, a requirement of heightened factual specificity obtains in *Bivens* cases in which the defendant's subjective motivation is an element of the plaintiff's cause of action. In *Harlow,* the Court recognized that since allegations of an official's improper state of mind lead to "[j]udicial inquiry into subjective motivation," permitting such allegations to defeat qualified immunity would expose government officials to "broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues." 457 U.S. at 817. "Inquiries of this kind," the Court pointed out, "can be peculiarly disruptive of effective government." *Ibid.* Accordingly, the Court framed the substantive immunity protection "essentially in objective terms," *id.* at 819, and made plain that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery," *id.* at 817-818. In other words, as part of the substantive protection accorded government officials, the Court "replac[ed] the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action." *Creighton,* 483 U.S. at 645.

Harlow thus forecloses a plaintiff from alleging improper motive or malice to defeat head-on the official's asserted defense of qualified immunity. On the other hand, neither *Harlow* nor the Court's other immunity decisions have squarely resolved a related issue, *i.e.,* whether a plaintiff's allegation of improper motive or malice as an element of the claimed constitutional violation indirectly negates the official's asserted immunity

defense. See Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation,* 95 Yale L.J. 126, 134-147 (1985). Some constitutional claims involve the actor's state of mind as an element of the cause of action. See, *e.g., Branti* v. *Finkel,* 445 U.S. 507, 513-517 (1980) (First Amendment prohibits federal official's firing of subordinate because of his political affiliation). *Harlow* could be read to preclude any *Bivens* claim that necessarily involves inquiring into an official's state of mind (or at least to preclude those claims that turn on proof of improper motive).

The lower courts, however, have taken a different approach. See, *e.g., Rakovich* v. *Wade,* 850 F.2d 1179, 1210 (7th Cir. 1987) (en banc), cert. denied, 488 U.S. 968 (1988); *Hobson* v. *Wilson,* 737 F.2d at 29-30. They have struck the balance by allowing plaintiffs to pursue *Bivens* actions where improper motive is an element of the claim, while insisting that once the defendant has asserted his right to immunity, the plaintiff may proceed with the litigation only if he supports his allegation of improper motive with sufficient precision and factual specificity.

As recognized in *Harlow,* "an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury." 457 U.S. at 816; see *Malley* v. *Briggs,* 475 U.S. 335, 341 & n.4 (1986). And issues surrounding an official's motivation—"questions of subjective intent"—"so rarely can be decided by summary judgment." *Harlow,* 457 U.S. at 816; see *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 256 & n.7 (1986). For those reasons, the Court has refused to allow a plaintiff to defeat immunity with "bare allegations of malice." *Harlow,* 457 U.S. at 817. The same reasoning obtains where improper motivation is an element of the plaintiff's cause of action.

Since the issue of the official's improper motivation is—by definition—subjective, mere conclusory allegations of malice, without more, could automatically usher officials into discovery. But that state of affairs would undermine the purpose of qualified immunity—to afford an "entitlement [to] an *immunity from suit*." *Forsyth,* 472 U.S. at 526. Indeed, to permit such an end run around the immunity doctrine would contravene this Court's directive that "[u]ntil [the] threshold immunity question is resolved, discovery should not be allowed." *Harlow,* 457 U.S. at 818. In other words, "[t]he result would be precisely the burden *Harlow* sought to prevent." *Hobson* v. *Wilson,* 737 F.2d at 29.[12]

A bare, conclusory allegation of improper motivation as an element of a constitutional claim may not be permitted to trump the substantive protection accorded by the immunity doctrine. See, *e.g., Pueblo Neighborhood Health Centers, Inc.* v. *Losavio,* 847 F.2d 642, 649 (10th Cir. 1988); *Elliott* v. *Perez,* 751 F.2d at 1482; *Hobson* v. *Wilson,* 737 F.2d at 29-30. As the D.C. Circuit has correctly held:

> [S]ome factual allegations must support claims of unconstitutional motive. Plaintiffs who fail to allege any specific facts to support a claim of unconstitutional motive cannot expect to involve Government actors in protracted discovery and trial.

Id. at 30. Thus, in order to reach the discovery stage, a plaintiff must allege "specific and concrete facts that raise a genuine issue as to the objective reasonableness" of the official's challenged conduct. *Smith* v. *Nixon,* 807 F.2d 197, 201 (D.C. Cir. 1986) (Scalia, J.).[13]

[12] For that reason, petitioner's assertion (Br. 20-22) that the mere allegation of malice as an element of the constitutional claim defeats the official's asserted immunity cannot be squared with *Harlow* and this Court's treatment of the qualified immunity doctrine.

[13] Petitioner's amicus contends (ACLU Br. 11-14) that the court of appeals erred in holding that a plaintiff may not show improper motivation by circumstantial, as opposed to direct, evidence. To be sure, the court of appeals did say that "unconstitutional motive * * * must be pleaded with specific discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of the intent." Pet. App. 14a. But as this Court has recognized, "[c]ircumstantial evidence * * * is intrinsically no different from testimonial evidence," *Holland* v. *United States,* 348 U.S. 121, 140 (1954), and we do not think the court of appeals' opinion, which focused primarily on the conclusory nature of petitioner's assertions, must be read to conflict with that holding. Nor is any distinction between "circumstantial" and "direct" proof, as those terms are understood in the law of evidence, necessary to the resolution of this case.

In our view, the heart of the court of appeals' analysis was that once the defendant has raised the immunity issue, the plaintiff may not rely solely on subjective allegations (*e.g.*, the defendant disliked or resented the plaintiff and therefore his unfavorable recommendation was false and malicious), attenuated inferential and circumstantial allegations (*e.g.*, the defendant is a Democrat and therefore fired the plaintiff because he was a Republican), or otherwise conclusory allegations (*e.g.*, the defendant's actions show his malice), to support a claim of improper motive. Rather, the plaintiff must set forth *objective* facts that are "specific and concrete" and "raise a genuine issue as to the objective reasonableness" of the defendant's conduct. *Smith* v. *Nixon,* 807 F.2d at 201. That analysis, for the reasons set forth above, is dictated by the purposes and scope of the qualified immunity doctrine.

C. The Federal Rules Of Civil Procedure Do Not Preclude A Requirement That, Once The Defense Of Qualified Immunity Is Raised, The Plaintiff Must Set Forth Essential Facts Regarding A Claim Of Malice With Sufficient Precision To Negate The Defense

Contrary to petitioner's contention (Br. 23-24), the pertinent Federal Rules of Civil Procedure in no way preclude the court from requiring the plaintiff in a *Bivens* action—once the defendant has asserted his immunity—to set forth essential facts regarding the government official's malice with sufficient precision to negate the immunity. Indeed,

such a requirement follows from this Court's directive that a "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Butz,* 438 U.S. at 508.

1. Under Fed. R. Civ. P. 8(a), the plaintiff must set out in his complaint "a short and plain statement of the claim" showing that he is entitled to the relief sought. The purpose of this rule is to provide the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson,* 355 U.S. 41, 47 (1957). Accordingly, the rule mandates that "the [plaintiff] disclose adequate information concerning the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it." 5 C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2d* § 1215, at 145 (1990).

The requirement of factual specificity once the defendant asserts immunity—the so-called "heightened pleading" standard, see, *e.g., Brown* v. *Frey,* 889 F.2d at 170— is a sound application of the mandate of Rule 8 that the plaintiff show his entitlement to the relief sought. Requiring the plaintiff to make such a showing thus amounts to nothing more than the "firm application" of Rule 8 that this Court's decisions demand. See, *e.g., Harlow,* 457 U.S. at 819-820 n.35; *Butz,* 438 U.S. at 508.

Indeed, to tolerate conclusory allegations in these circumstances would be to adopt the "sue now, discover if you have a claim later" approach to litigation. See *Martin* v. *D.C. Metropolitan Police Dep't,* 812 F.2d 1425, 1430 (D.C. Cir. 1987). That approach would be wholly inconsistent with the proper scope of *Bivens* actions, in which federal officials are put individually at risk, thus potentially "undermin[ing] the effectiveness of government as contemplated by our constitutional structure." *Harlow,* 457 U.S. at 819-820 n.35. As the Tenth Circuit recently

observed, allowing *Bivens* actions to become "fishing expedition[s] * * * would defeat the rationale for the qualified immunity defense." *Sawyer* v. *County of Creek,* 890 F.2d at 668.

2. Rule 9(b) provides that "[m]alice * * * and other condition of mind of a person may be averred generally." Fed. R. Civ. P. 9(b). Accordingly, where the defendant's state of mind is an element of the constitutional cause of action, the plaintiff may plead that state of mind in general terms in his complaint. But once the defendant asserts his qualified immunity and moves for summary judgment (or dismissal) on that ground, the landscape has substantially changed.

First, where (as here) the motion is one for summary judgment, Rule 9(b) does not govern the disposition of such a motion under Fed. R. Civ. P. 56. In order for the plaintiff to overcome the official's claim of immunity and to proceed with the litigation, he must present specific, concrete facts supporting the general averment of malice or other improper motive in his complaint. Indeed, Rule 56(e) provides that a party against whom summary judgment has been sought "may not rest upon the mere allegations or denials of the adverse party's pleading," and "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see *Lujan* v. *National Wildlife Fed'n,* 110 S. Ct. 3177, 3188-3189 (1990). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).[14]

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[14] A plaintiff who is unable to make the required showing can resist summary judgment only by filing an affidavit under Fed. R. Civ.

Second, when a defendant has asserted qualified immunity and moved either for summary judgment under Rule 56 or for dismissal under Rule 12, the defendant's *substantive* right of qualified immunity requires the plaintiff to present specific, concrete facts supporting his general averment of malice or other improper motive. The entitlement to immunity from suit—and the attendant shield against the burdens of discovery and further proceedings until the court resolves the threshold issue of immunity—

P. 56(f) specifying why discovery is necessary. As the Tenth Circuit has explained,

> in response to a summary judgment motion based on qualified immunity, a plaintiff's 56(f) affidavit must demonstrate "*how* discovery will enable [him] to rebut a defendant's showing of objective reasonableness" or, stated alternatively, demonstrate a "connection between the information he would seek in discovery and the validity of the [defendant's] qualified immunity assertion."

Lewis v. *City of Ft. Collins*, 903 F.2d 752, 758 (1990) (quoting *Jones* v. *City and County of Denver*, 854 F.2d 1206, 1211 (10th Cir. 1988)).

In this case, no such affidavit was submitted. Moreover, this Court's statement in *Creighton*, 483 U.S. at 647 n.6—that in certain circumstances discovery "tailored specifically to the question of [the defendant's] qualified immunity" "may be necessary before [the defendant's] motion for summary judgment on qualified immunity grounds can be resolved"—does not support additional discovery on the record presented. As the court of appeals explained (Pet. App. 18a), in *Creighton* the Court was referring to a case in which the plaintiff and the defendant presented differing versions of the defendant's conduct. See 483 U.S. at 646-647 n.6. Here, by contrast, there is no dispute that respondent composed and sent the unfavorable recommendation letter; the only disputed question is whether he did so with impermissible motivation and intent. Nothing in *Creighton* suggests that petitioner may pursue discovery—certainly not in the absence of the particular showing required by a Rule 56(f) affidavit—in the hope of garnering support for his otherwise unsupported belief that respondent sent the letter in bad faith.

would be nullified if conclusory allegations of improper motive enabled plaintiffs to proceed in the face of an assertion of immunity. In these circumstances, Rule 9(b) does not define or limit the showing that must be made to overcome the assertion of immunity. Cf. *Elliott* v. *Perez*, 751 F.2d at 1479. Nor may the Rule be invoked as a sword to cut down the substantive scope of the qualified immunity right.

Under the Rules Enabling Act, the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. 2072(b). See *United States* v. *Sherwood*, 312 U.S. 584, 589-591 (1941). If *Bivens* actions in these circumstances are to be allowed at all, the qualified immunity accorded to government officials—an immunity not only from liability but from the burdens of litigation—can be enforced effectively only by requiring specific, non-conclusory allegations of improper motivation. That enforcement, and hence the substantive right at stake, cannot be abridged by application of an otherwise valid procedural rule. Thus, to the extent there is any conflict between Rule 9(b) and the right to qualified immunity—and for the reasons stated we do not believe there is—Rule 9(b) must give way to vindication of the substantive right. Cf. *Elliott* v. *Perez*, 751 F.2d at 1479; *Morrison* v. *City of Baton Rouge*, 761 F.2d 242, 244 (5th Cir. 1985).

D. Petitioner's Conclusory Allegations Of Malice Are Not Sufficient To Overcome Respondent's Defense Of Qualified Immunity

In this case, petitioner based his *Bivens* action on the claim that in submitting an unfavorable recommendation to his prospective employer, respondent "maliciously and in bad faith" deprived petitioner of liberty without due process of law, in violation of the Fifth Amendment. J.A.

9 (Compl. ¶ 30). Assuming, as did the court of appeals, Pet. App. 16a-17a, that the conduct alleged constituted a clearly established constitutional violation if respondent acted maliciously and in bad faith,[15] petitioner failed to allege specific and concrete facts raising a genuine issue regarding the objective reasonableness of respondent's conduct. As the court of appeals found (Pet. App. 17a), all of petitioner's allegations (see Br. 26-27) are entirely consistent with a former supervisor's good faith response to a solicited recommendation.[16]

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[15] In view of the procedural opportunities afforded to petitioner, see note 16, *infra*, we do not believe that any such violation could be established.

[16] Petitioner (Br. 17-20) and his amicus (ACLU Br. 8-11) contend that, even without any proof or allegation of malice, respondent's conduct violated a clearly established constitutional right, and thus the court of appeals erred in ordering the case dismissed. That contention—which was not presented as a question for review in the certiorari petition (Pet. i; see Br. i), was mentioned there only in passing (Pet. 19-20 n.27), and is scarcely related to the questions on which the Court granted certiorari—is not properly before the Court. S. Ct. Rules 21.1(a) and 24.1(a); see, *e.g.*, *Berkemer* v. *McCarty*, 468 U.S. 420, 443 n.38 (1984); *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 438-429 (1964).

In any event, the contention is meritless. First, in order for an allegation of defamation to state a claim under the Due Process Clause, the plaintiff must sufficiently allege that the governmental actor's conduct deprived him of a protected liberty interest greater than an injury to reputation, see *Paul* v. *Davis*, 424 U.S. 693, 708-709 (1976), *and* that the actor's conduct denied him adequate process, *i.e.*, "an opportunity to clear his name," *Codd* v. *Velger*, 429 U.S. 624, 624 (1977) (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 573 n.12 (1972)). Here, on the basis of petitioner's own concessions, it is evident that he had such an adequate opportunity, through the administrative review process provided by the Army and HHS, to "refute [respondent's] charges and clear [his] name." *Doe* v. *United States Dep't of Justice*, 753 F.2d 1092, 1112 (D.C. Cir. 1985); see J.A. 7-8, 22. And petitioner may not avoid this straightforward application

Petitioner asserts that the fact that respondent called him "inept," when in past years "he had always received exemplary evaluations at Saint Elizabeths," is itself a sufficient ground for a jury to conclude that respondent "had acted maliciously." Br. 26. That assertion is makeweight. What other supervisors in the past may have thought of petitioner's performance says nothing about petitioner's work under respondent's supervision, let alone about whether respondent could, without malice, refer to petitioner's work as inept. Thus, petitioner's assertion is the sort of weak circumstantial allegation that does not overcome an official's defense of immunity.[17] Petitioner fares

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of the law by now sounding his constitutional claim in "substantive due process." Br. 17. This Court has never held that the Due Process Clause contains a substantive right—independent of the adequacy of procedures for redress—to be free from a government actor's stigmatizing defamation.

Second, respondent's conduct did not violate clearly established law, since as the court of appeals pointed out (Pet. App. 15a-16a), there were no decisions holding that a recommendation in response to an inquiry from another government agency could be actionable absent a finding of malice. Cf. *Hannon* v. *Turnage*, 892 F.2d 653, 660 (7th Cir.), cert. denied, 111 S. Ct. 69 (1990). Indeed, at common law, a party who responds to a solicitation by warning a present or prospective employer about the misconduct or bad character of an employee is generally immune from suit in the absence of malice. See, *e.g.*, *Prosser & Keeton on the Law of Torts* § 115, at 827-828 (5th ed. 1984); *Henderson* v. *Teamsters Union, Local 313*, 90 Wash. 2d 666, 585 P.2d 147 (1978); *Burdett* v. *Hines*, 125 Miss. 66, 87 So. 470 (1921).

[17] On this record, respondent's use of the term "inept" cannot bear the weight petitioner would have it carry. Petitioner admitted that he resisted his supervisor's command and that his official records showed him to have been on unauthorized leave for prolonged periods. See J.A. 19-20. Moreover, respondent was not alone in taking a dim view of petitioner's performance. HHS considered his work unacceptable and therefore officially proposed firing him. See J.A. 15; see also J.A. 21.

no better in trying to show malice by asserting that respondent's letter failed to respond to the "credential information request form." Br. 27. The request form, by its plain language, asks for "all information on job performance and privileges granted while [petitioner] was a member of [St. Elizabeth's staff]." Pet. App. 55a. A response evaluating petitioner's performance during the past year was clearly within the scope of petitioner's request.

Petitioner next asserts that his "conflicts with [respondent] as to how the behavior modification program should be run" shows the source of respondent's malice. Br. 27. Those "conflicts," as petitioner concedes, were of his own making, since he "resisted" respondent's "attempts to modify some aspects of the * * * program." J.A. 20. As petitioner admits, he balked at respondent's supervision on the basis of a self-proclaimed superior knowledge about behavior therapy. *Ibid.* Thus, the "conflict" petitioner alleges is entirely consistent with an accurate, good faith report on the employee's performance and does not cast doubt on the objective reasonableness of respondent's conduct.

Petitioner also relies on his allegation that respondent "resented [his] absence for several months." Br. 27. Petitioner based that allegation, however, solely on his "understanding." J.A. 20. Such a conclusory statement about respondent's state of mind, in the absence of concrete, objective facts, amounts to nothing more than a faint-hearted attempt to bolster one conclusory statement (that respondent was malicious) with another (that respondent was resentful).

In any event, petitioner admits that his official records noted that he was "AWOL" for a considerable period of time. J.A. 19. Although petitioner alleges that the Worker's Compensation Board later compensated him for the leave time, petitioner has not alleged that respondent knew

of the Board's decision when he wrote the recommendation letter. To the contrary, petitioner alleged that "[h]ad [respondent] made a simple inquiry * * *, he would have discovered that [petitioner] had been fully compensated for the periods during which [respondent] apparently considered him 'AWOL' and which apparently was the cause of [respondent's] belief that [petitioner] was 'untrustworthy,' *inter alia*." Pet. Mem. in Support of Opp. to Resp. Mot. to Dis., *supra*, at 12. Accordingly, the undisputed facts and petitioner's own allegations portray a supervisor who could have honestly believed that his former employee had been away from his hospital post without authorization. These allegations are consistent with a strongly worded, adverse recommendation written in good faith, and thus do not undermine the objective reasonableness of respondent's conduct.[18]

In sum, as the court of appeals found, petitioner's allegation of malice was "unsupported by any evidence beyond innuendo." Pet. App. 17a. The crux of petitioner's evidentiary submission is that since respondent considered petitioner a poor employee because of his resistance to the orders of his supervisor and his unexplained absences from work, respondent's unfavorable recommendation must have been malicious. The flaw in this reasoning lies

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[18] Petitioner also contends (Br. 27) that the allegedly defamatory statement itself – respondent "consider[ed] [petitioner] to be both inept and unethical, perhaps the least trustworthy individual [he has] supervised," J.A. 6 (Compl. ¶ 11) – shows malice. That single statement from respondent's recommendation letter, although using frank language, does not in itself raise any doubt about the accuracy of respondent's opinion or the objective reasonableness of respondent's conduct. Cf. *Milkovich* v. *Lorain Journal Co.*, 110 S. Ct. 2695, 2709-2710 (1990) (Brennan, J., concurring). And taken in the context of this record, respondent's statement is entirely consistent with an obligation of good faith.

in the fact that it is entirely consistent with an obligation of good faith to issue a frank, unfavorable recommendation about a former employee who does not follow orders and does not appear for work. Accordingly, the court of appeals correctly held that petitioner's allegations of malice did not sufficiently negate the defense of qualified immunity to permit him to proceed with this *Bivens* action.

II. SINCE RESPONDENT ACTED IN THE PERFORMANCE OF A DISCRETIONARY FUNCTION, HIS CONDUCT DOES NOT FALL OUTSIDE THE SCOPE OF THE QUALIFIED IMMUNITY DEFENSE

Under the doctrine of qualified immunity, a federal official is entitled to that defense when he acted "in the performance of discretionary, but not ministerial, functions." *Davis* v. *Scherer*, 468 U.S. 183, 196 n.14 (1984); see, *e.g.*, *Harlow*, 457 U.S. at 816. As this Court has made clear, "the scope of the 'ministerial duty' exception to qualified immunity" is narrow. *Davis*, 468 U.S. at 196 n.14. In particular, "[a] law that fails to specify the precise action that the official must take in each instance creates only discretionary authority." *Id.* at 197 n.14.[19]

Here, contrary to petitioner's submission (Br. 27-29), respondent's conduct is precisely the sort of discretionary decisionmaking protected by the doctrine of qualified immunity. Providing information about the job performance

[19] Petitioner's reliance (Br. 28-29) on *Westfall* v. *Erwin*, 484 U.S. 292 (1988), is off the mark. In *Westfall*, this Court held that a federal employee sued for damages on a common law tort theory is not entitled to absolute immunity from suit unless the challenged conduct is discretionary in nature. *Id.* at 297-298. That holding has no bearing here because the question of absolute immunity from common law claims is not at issue. See also note 5, *supra*. In any event, this Court has never suggested, in *Westfall* or any other decision, that the discretion standard applicable to claims of absolute immunity obtains in the qualified immunity context.

of a subordinate employee necessarily entails judgment and discretion, and petitioner does not allege that respondent acted contrary to any specific statutory or regulatory directive. Indeed, the common law provides a qualified privilege to a person who responds to a request to evaluate a former employee because of the importance and subjective nature of such communications. See note 16, *supra*. And the record belies petitioner's assertion that "responding to the [Credential Information Request] Form involved a purely administrative function of locating, copying and sending documents referred to by the Form." Br. 28. The request sought "all information on [petitioner's] job performance." Pet. App. 55a. Such a sweeping request for information—in the context of enabling the Army to assess petitioner's fitness to serve as a psychologist at one of its hospitals—does not at all preclude an evaluation of petitioner's job performance by his previous supervisor.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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No. 90-96

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October Term, 1990

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Petitioner

v.

H. MELVYN GILLEY,

Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

ARGUMENT

1. Plaintiff and defendant agree on several of the important factors which are material to the first question raised in this case:

a. If there is a failure to objectively allege in a *Bivens* complaint assertions sufficient under Rule 8(a)(2) standards to state a claim of a violation of a clearly established right, the complaint must be dismissed. Resp. Br. at 16-19, 22. Thus, qualified immunity provides an official with immediate protection from suit even where a

constitutional right has been violated but where that right was not clearly established at the time of the incident.

b. Where malice is an element of the clearly established right which has been claimed to have been violated, "*this* threshold immunity question," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added), whether a clearly established right has been alleged, should be deemed to have been satisfied.[1] That is, while bare allegations of malice cannot be used to undermine a claim of qualified immunity, when malice is alleged as an element of a constitutional tort, that state of mind should be treated as any other element in the case. Resp. Br. at 18-20.

c. When malice has been alleged as an element of the constitutional claim, a plaintiff may plead that element generally in his complaint in conformity with the provisions of Rule 9(b). Resp. Br. at 23.[2] That is, it is

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[1] Throughout his brief, defendant changed "this" to "the" when he cited or referred to the *Harlow* quote, above. See, e.g., Resp. Br. at 17, 18, 20, 24. This seemingly inconsequential but serious alteration explains why defendant believes, see *infra*, and why some lower courts have held, that *Harlow* stands for the rule that no discovery at all is permitted before the entire issue of qualified immunity has been determined. A proper reading of *Harlow*, however, underscored, for example, in *Anderson v. Creighton*, 483 U.S. 635, 646-47 n.6 (1985), shows that discovery may not be conducted only prior to a determination of "this threshold question of immunity," that is, only not prior to the determination of whether a violation of a *Harlow-Anderson* clearly established right has been alleged. See also, App. 23a.

[2] In addition to those cases which demonstrate that malice may be an element of the right which plaintiff alleged was violated, cited in plaintiff's brief, at 19, see *White v. Nicholls*, 3 How. 266, 11 L. Ed. 591 (1845).

inappropriate to apply a "heightened pleading standard" to a *Bivens* complaint.

d. The court below erred in its insistence that "direct" as opposed to circumstantial evidence of unconstitutional motive must be pleaded in order to defeat a qualified immunity defense. Resp. Br. at 20-21 n. 13. This bears particular emphasis since one of the two key rationales used by the court below in denying plaintiff's claim was that he failed to allege "direct evidence" of an unconstitutional motive. App. 13a-14a. The government does not defend that aspect of that court's decision here.[3]

e. Once discovery has taken place, the appropriate standard under Rule 56 is not simply whether a clearly established right has been stated but rather whether there are specific facts of record, in accordance with this Court's decisions in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), to allow the case to proceed beyond summary judgment. Pet. Br. at 22-23.

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[3] Thus, at the pre-discovery summary judgment stage, if it is determined that where malice is alleged a standard of pleading greater than that required under Rules 8(a)(2) and 9(b) must be met, see, *infra*, the question then becomes whether plaintiff's circumstantial evidence was sufficient to meet that standard and whether he is therefore entitled to discovery on the limited issue of qualified immunity. *Anderson v. Creighton*, 483 U.S. at 646-47 n. 6. Applying a heightened pleading standard, the trial court ruled that it was. Given the district court's conscientious review of, and its application of the law to, the record, unless this Court determines that in making that finding the trial court abused its discretion, or was clearly erroneous, its decision should not now be disturbed.

2. The issues which divide the parties are two. First, where a motion for summary judgment is based upon qualified immunity, whether *prior to discovery* a plaintiff must provide facts with respect to any element of the constitutional claim, including the element of unconstitutional motive, sufficient to satisfy the Rule 56(e) standard. In other words, should the Rule 56(e) "specific facts" pleading requirement be applied to the issue of malice, or to any other element of the clearly established right alleged in the complaint, *before* plaintiff has had the opportunity to secure additional relevant facts. Second, and specifically with respect to this case, whether the evidence alleged as a whole, including circumstantial evidence of malice and the reasonable inferences which may be drawn from that evidence, was a sufficient basis for the trial court to order limited discovery, on the material elements of malice and the falseness of the statements made in defendant's letter, in order to determine whether these issues were genuinely in dispute.[4]

a. Under settled law of Rule 56 doctrine, discovery should be permitted on any issue fairly raised by the pleadings, including unconstitutional motive, so that the purpose of summary judgment, to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial," can be realized. Comments to 1963 Amendments, Rule 56. See also, *Celotex Corp. v.*

[4] In ordering limited discovery the trial court stated: "If the information supplied by defendant is true, and the plaintiff is plainly incompetent and derelict, the plaintiff must bear the cross. Furthermore, the defendant must be protected in providing such information if he acted in good faith." App. 52a.

Catrett, 477 U.S. 317, 322 (1986) (" . . . Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery. . . . "). The doctrine of qualified immunity as construed by this Court provides a significant defense to governmental officials who have in fact violated constitutional rights but who are protected from liability if the rights were not clearly established at the time of the incident. That defense, however, does not purport to change the rules which govern summary judgment procedure. Where the right alleged is clearly established in a specific and narrow sense, *Anderson v. Creighton*, 483 U.S. 635 (1987), and malice or some other state of mind is an element of the claim, the general discovery tools listed in Rule 56(c) should be utilized, and the post-discovery "specific facts" standard, Rule 56(e), should only then be applied. Before discovery has taken place, however, if a plaintiff does not file a Rule 56(f) statement and instead relies on affidavits in opposing a summary judgment motion, there should be "some evidentiary basis . . . [which would] demonstrate . . . with some plausibility," App. 24a, that a party's opposition is "justif[ied]," Rule 56(f), and that he "might defeat" a qualified immunity claim. App. 24a.[5]

Together with the formidable hurdle of demonstrating prior to discovery that a clearly established right

[5] This standard provides a workable accommodation between the policies reflected in the federal rules, a plaintiff's right to prove his case and qualified immunity concerns.

has been violated, this standard does not "end run" the policy considerations at stake when a federal official faces personal liability for his unconstitutional acts. Rather, as the government itself recognizes, the impermissible motive allegations have been made to prove a specific element of a constitutional claim. Accordingly, a plaintiff who has met this standard ought to be able to proceed to the next stage of litigation, that is, to narrowly tailored discovery such as that ordered by the trial court, App. 52a, in order to determine whether there are genuine issues for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

b. As to the second question, defendant characterizes as "conclusory," Resp. Br. at 20, 25, plaintiff's circumstantial evidence of malice and argues that it was therefore insufficient to meet the "specific facts" standard considered by defendant to be proper for pre-discovery determinations of qualified immunity claims. Even if defendant is correct in his assessment that the Rule 56(e) standard should apply pre-discovery, ample facts were alleged to warrant the straightforward application of the procedure announced in *Anderson v. Creighton*, 483 U.S. at 646-47 n.6. In other words, and tracking the steps set forth in that case, the trial court determined that a clearly established right sufficiently had been asserted. The court therefore ordered discovery on the discrete question as to whether "the actions . . . [Gilley] took were different from those . . . [Siegert] allege[d]. . . . " *Id.* See *supra*, n. 4.

Plaintiff alleged in his complaint that defendant had acted maliciously in writing false information about him which resulted in a "stigma-plus" injury. Plaintiff's allegations as a whole, however, contained much more than

mere conclusions. He explicitly alleged in his complaint and in opposition to summary judgment 1) that he had always had exemplary job performance ratings prior to defendant's evaluation, J.A. 20, 2) that plaintiff's proposed removal from Saint Elizabeths was due to his conflicts with defendant, J.A. 21, 3) that there had been long-standing professional and personal conflicts between the two psychologists, J.A. 5-6, and 4) that defendant resented plaintiff's being away from work as a result of plaintiff's head injury. J.A. 20. Malice was also evidenced by reasonable inference: 1) defendant had failed to respond to what the Credential Information Request Form actually sought, and 2) the language defendant used was "extreme" which therefore "inherently cast . . . doubt on defendant's neutrality." App. 24a-25a.

Plaintiff's assertions as a whole, and the reasonable inferences that may be drawn from them, significantly exceeded a "complete failure of proof," *Celotex Corp. v. Catrett*, 477 U.S. 242, 255 (1986), and more than showed that there were genuine issues for trial and that a reasonable jury could justifiably infer and reasonably conclude that defendant had acted with malice. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Therefore, discovery as ordered by the trial court should have been allowed to proceed.

3. Defendant contends that the issue as to whether the court of appeals erred in dismissing plaintiff's case, because a clearly established right independent of malice had not been alleged, was not presented as a question for review, was mentioned "only in passing" in plaintiff's petition for certiorari and is "scarcely related" to the questions on which certiorari was granted. Therefore,

defendant argues, this issue is not properly before this Court. Resp. Br. at 26 n. 16.

That the court below erred on this point was squarely raised and "pressed," *Illinois v. Gates*, 462 U.S. 213, 219 (1983), in plaintiff's petition for certiorari. Pet., at 19-20 n. 27. As importantly, the issue of whether plaintiff had alleged a clearly established right was "pressed" by the government and was "passed upon," *Illinois v. Gates*, 462 U.S. at 219, by the court below as a result of the government's urging. App. 14a-16a. Moreover, that question is fairly included within the first question explicitly presented for review. Indeed, that inquiry is the very "threshold" to the entire immunity question, *Harlow v. Fitzgerald*, 457 U.S. at 818, and is therefore "necessarily connected," *Dewey v. Des Moines*, 173 U.S. 193 (1899), to the first question presented for review. See also defendant's brief in opposition to plaintiff's petition for certiorari, at 8. Accordingly, "since the inquiry does not change the substance of the questions already presented . . . " Sup. Ct. Rule 24.1(a), this question should be decided on review. See *Illinois v. Gates*, 462 U.S. 213 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 114 n. 9 (1982) (the argument that the death penalty was excessive comprises the argument that the sentencer erred in refusing to consider relevant mitigating circumstances); *Pullian v. Allen*, 466 U.S. 522, 528 n. 5 (1984) (the question whether immunity bars an award of attorneys' fees against a judge was held to include the question of whether judicial immunity should have barred the injunctive relief awarded).

4. Defendant claims that plaintiff is only "now" sounding his constitutional claim in substantive due

process terms, and that, in any event, the due process clause has never been held to contain a substantive right to be free from an official's "stigmatizing defamation." Resp. Br. at 26-27 n.16. Defendant is wrong on both counts.

Plaintiff's pleadings, fairly read, allege a substantive due process violation since they demonstrate an unconscionable "abuse of office." *Harlow v. Fitzgerald*, 457 U.S. at 814. See also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957), cited in *Richardson v. Chevrefils*, 552 A.2d 89, 94 (N.H. 1988). Moreover, in its argument on this point, the government has misconstrued the constitutional violation alleged by plaintiff. It is not just a "stigmatizing defamation," Resp. Br. at 26-27 n.16, that is at issue. Rather, plaintiff suffered a "stigma-plus" injury, that is, injury to reputation plus loss of employment status, as a direct result of a ministerial and constitutionally abusive act of a federal official.

CONCLUSION

For the foregoing reasons, and for those stated in plaintiff's brief, the judgment of the court of appeals should be reversed with instructions to the court below to remand the case to the district court for discovery and trial on the merits.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF THE NATIONAL CAPITAL AREA SUPPORTING PETITIONER

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BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF THE NATIONAL CAPITAL AREA SUPPORTING PETITIONER

INTEREST OF AMICI[1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with over 270,000 members that, since its founding in 1920, has been devoted to protecting the constitutional rights of all American. Towards that goal, the ACLU has frequently represented individuals in civil actions seeking damages against government officials who have violated their constitutional rights. The

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[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

substantive and procedural parameters of official immunity from such liability is thus of direct concern to the ACLU and its clients.

The American Civil Liberties Union of the National Capital Area is the Washington, D.C., affiliate of the ACLU and has been involved in many cases involving claims against government officials where qualified immunity is interposed as a defense to asserted violations of constitutional rights. Indeed, *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); *Hobson* v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); and *Fludd* v. *U.S. Secret Service*, 771 F.2d 549 (D.C. Cir. 1985), were ACLU/NCA cases.

STATEMENT

1. Petitioner Siegert was a psychologist employed by the federal government at St. Elizabeths Hospital from November 1979 until October 1985. He resigned in October 1985, mainly because of personal and professional differences with respondent Gilley, who became Siegert's supervisor in January 1985.[2] Before Gilley became Siegert's supervisor, Siegert received exemplary job performance ratings from his supervisors. His performance was adjudged to be "outstanding" in 1984.

Siegert began looking for another job soon after Gilley became his supervisor. In May 1985, the Army informed Siegert that he would be considered

[2] Pet. App. 33a. The professional differences centered around Gilley's attempts to change some aspects of St. Elizabeths' behavior modification program for the mentally retarded. The personal differences centered around Siegert's extensive medical leave during the spring of 1985 as a result of injuries he sustained from a patient.

for vacancies in European posts as a clinical psychologist. In late August 1985, Siegert signed a 36-month contract with the Army hospital in Bremerhaven, West Germany, to work in the area of his expertise, child development and behavior therapy.

In early September 1985, Siegert learned that he was going to be terminated by St. Elizabeths, at least in part because of his conflicts with Gilley. Pet. App. 33a. Siegert met with officials at the hospital and reached an agreement that if he resigned, a letter of removal would not appear in his personnel file. In reaching this agreement, Siegert sought to protect his future job prospects and his standing in his professional community.

In October 1985, Bremerhaven forwarded to St. Elizabeths a request form for information about Siegert. There followed a letter dated October 23, 1985, from Gilley to Lt. Col. Smith of Bremerhaven, in which Gilley accused Siegert of being inept, unethical and one of the least trustworthy individuals he had supervised during his thirteen years at St. Elizabeths.[3] As a result of this letter, Siegert was denied credentials for working with children at Bremerhaven and was relegated to library work.

In July 1986, because of his difficulty in obtaining credentials at Bremerhaven, Siegert sought a position as a clinical psychologist at the Army base in Stuttgart. Ultimately, Siegert was told that he was not wanted there because of what had been learned about him from Bremerhaven personnel. Siegert was unsuccessful in his attempts to overturn the Bremer-

[3] According to the District Court, this letter followed a conversation between Col. Smith and Gilley, initiated by Col. Smith. Pet. App. 34a.

haven credentialing decision administratively and was thus unable to practice there as a clinical psychologist in the area of his specialty or any other comparable area.

2. In November 1986, Siegert brought this action in the United States District Court for the District of Columbia. Siegert alleged that Gilley's statements were false and made in bad faith, depriving Siegert of liberty without due process in violation of the Fifth Amendment. Siegert sought damages from Gilley under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Gilley moved for dismissal or summary judgment based on his defense of qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

In December 1987, the District Court denied Gilley's motion on the ground that the record was insufficiently developed. On its own motion, the court ordered discovery, limited to the taking of depositions from the parties and Col. Smith. The tenor of the court's subsequent opinion indicates that it believed Siegert's claims to be substantial and potentially meritorious. The court apparently sought to protect Gilley by testing Siegert's claims through discovery, rather than immediately ordering Gilley to face trial. *See* Pet. App. 52a.

In June 1988, in its opinion on Gilley's motion for reconsideration and stay, the District Court ruled that Siegert had alleged a violation of a constitutionally protected liberty interest that was clearly established in the case law at the time of Gilley's actions. The court provisionally rejected Gilley's qualified immunity defense, pending the completion of discovery.

In an opinion this February, the Court of Appeals reversed. Holding the District Court's decision on Gilley's qualified immunity defense to be appealable, the court construed Siegert's complaint as alleging two independent violations of due process—(1) Gilley's stigmatization of Siegert and its resulting impact on Siegert's employment prospects, irrespective of Gilley's motivation; and (2) Gilley's bad faith and malice in sending to Col. Smith a letter filled with accusations about Siegert that Gilley knew to be false.

As to the first claim, the court held that Gilley's objective conduct did not violate a "clearly established" right notwithstanding its decisions in *Doe* v. *United States Dep't of Justice*, 753 F.2d 1092 (D.C. Cir. 1985), and *Bartel* v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984)—two cases that found constitutional violations on facts virtually indistinguishable from those presented here. As to the second claim, without deciding whether Gilley's bad faith motivation would suffice to make his actions a violation of Siegert's constitutional rights, the court held that the facts pleaded by Siegert with respect to Gilley's motivation were too "circumstantial" to survive a motion to dismiss.[4] It held that its prior decisions interpreting *Harlow* precluded the trial judge from ordering even limited discovery on the issue of Gilley's motivation prior to ruling on the motion for dismissal or summary judgment. "[D]iscovery is not to be allowed until plain-

[4] "[W]e find that the invalidating motivation has not been pleaded with the offer of noncircumstantial proof required to satisfy our heightened pleading standard." Pet. App. 17a. Gilley's brief in opposition to certiorari suggested otherwise, but it was the circumstantial nature of Siegert's case—not the conclusory nature of his allegations—that the court considered fatal to his claim. *See* Pet. App. 13a-14a, 19a.

tiff has alleged the existence of direct evidence of impermissible motive." Pet. App. 13a.

Judge Wald dissented from the panel's refusal to allow the limited discovery ordered by the District Court. Observing that "proof of the defendant's motive is peculiarly in the defendant's hands," Judge Wald noted the injustice of requiring a plaintiff to proffer direct evidence of the defendant's motive in order to survive a motion to dismiss, while at the same time precluding the plaintiff from taking limited discovery on the issue. Pet. App. 20a. She stated:

> "Narrowly tailored discovery, controlled in scope and duration by a trial judge sensitive to the problems of exposing officials to disruptive litigation, * * * allows worthy plaintiffs to mount reasonable challenges to otherwise impenetrable qualified immunity defenses. * * * Failure to provide any leeway for plaintiffs or trial judges, regardless of circumstances, to obtain evidence of illegal motives through limited discovery controlled by the trial judge is, in my view, not only unfair but unjustified by existing Supreme Court precedent." Pet. App. 22a, 24a.

SUMMARY OF ARGUMENT

The Court of Appeals committed two errors that place unfair and unjustifiable obstacles in the path of *Bivens* plaintiffs.

First, in ruling that Gilley's objective conduct did not violate a "clearly established" right, the court held, in effect, that official action will be protected by qualified immunity unless the very action in question has previously been held to be unlawful. By providing immunity in the absence of precedent on all fours

with the case at bar, the court's holding disregards the standard established in *Anderson* v. *Creighton*, 483 U.S. 635 (1987), and unreasonably restricts the availability of the *Bivens* remedy for violations of constitutional rights.[6]

Second, in holding that the claim based on Gilley's bad faith must be dismissed forthwith, the court arbitrarily and unfairly precluded reliance on circumstantial evidence to prove unconstitutional motivation, and improperly deprived the District Court of discovery as a tool for testing the strength of a *Bivens* plaintiff's claims prior to ruling on the qualified immunity defense. By demanding that a *Bivens* plaintiff proffer direct evidence of unconstitutional motivation, while prohibiting discovery unless the plaintiff is able to proffer direct evidence of such motivation beforehand, the court effectively has precluded *Bivens* claims in which the defendant's state of mind is an element. In so doing, the court undid the balance struck by this Court in *Harlow* between permitting vindication of constitutional rights and protecting government officials from harassing litigation and unwarranted liability.

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[6] Because the Court of Appeals' disposition of this issue was plain error, this Court may consider it even though the issue was not raised by the question framed in the petition for certiorari. *See* Sup. Ct. R. 24.1(a); *Washington* v. *Davis*, 426 U.S. 229, 238 & nn.8-9 (1978); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 257 & n.15 (1981) (review despite absence of "plain error"). The issue certainly is within the scope of the question presented in Gilley's brief in opposition ("Whether the Court of Appeals correctly dismissed this *Bivens* action on grounds of qualified immunity.").

ARGUMENT

I. GILLEY'S OBJECTIVE CONDUCT, IRRESPECTIVE OF HIS MOTIVATION, VIOLATED "CLEARLY ESTABLISHED" LAW.

Under the doctrine of qualified immunity, government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). In *Anderson* v. *Creighton*, 483 U.S. 635 (1987), the Court explained the sense in which the right alleged to have been violated must have been "clearly establishd":

> "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* at 640 (citations omitted).

Anderson thus charted a deliberate course between the Scylla and Charybdis of overgeneralizing and overparticularizing the right in question. The Court of Appeals disregarded that direction. Although it steered clear of one extreme—identifying the right in question so abstractly as to defeat the goals of qualified immunity—the court fell into the other extreme, ruling (in effect) that Gilley's objective conduct did not violate any "clearly established" right of Siegert's because no case previously decided by the court involved absolutely identical facts. As the District Court concluded, however, the unlawfulness of Gilley's conduct in October 1985 should have been apparent under two cases decided by the Court of Appeals before the actions in question were taken. *See* Pet. App. 42a-47a.

In *Doe* v. *United States Dep't of Justice*, 753 F.2d 1092 (D.C. Cir. 1985), the Court of Appeals held that a former Department of Justice attorney, discharged from her position amidst charges of unprofessional conduct and dishonesty, had asserted a constitutionally protected liberty interest because government action had both caused the loss of her job and stigmatized her. In *Bartel* v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984), the court similarly held that a former government air safety inspector, denied consideration for another position because of a defamatory letter written by his former supervisor, had identified a cognizable liberty interest the denial of which would violate due process.

The Court of Appeals agreed with the District Court that *Doe* and *Bartel* "illustrate circumstances in which a government official's stigmatizing comments will violate a former employee's protected liberty interest by effecting a change in his status vis-a-vis the government." Pet. App. 16a. Nevertheless, the court held that Gilley could not reasonably have known that his *precise* conduct was unlawful under these cases, because neither case involved the *precise* fact pattern presented by this case—stigmatizing allegations made in response to a request for a job reference from a prospective employer. Pet. App. 15a-16a. The court distinguished *Bartel* on the ground that the former supervisor in that case sent the defamatory letter on his own initiative and not in response to a solicitation for a job reference. Pet. App. 16a.

In support of this distinction, the court observed that under common law the qualified privilege for providing reports on former employees to prospective employers is "more likely" to be applicable when the report is requested rather than volunteered. Pet. App. 15a.[6] This contingency, however, does not make Siegert's due process right under *Doe* and *Bartel* any less "clearly established." At most, it provides Gilley with a possible further defense to Siegert's claim that his due process right was violated.

As Justice Souter observed not long ago in an opinion for the Supreme Court of New Hampshire, defendants in *Bivens* suits "can hardly demand that the precise actions in question must previously have been held to implicate procedural due process, lest the immunity become virtually plenary." *Richardson* v. *Chevrefils*, 552 A.2d 89, 93 (N.H. 1988).[7] Allowing

[6] The source cited by the court actually says that the presence or absence of a request is "merely one of the factors to be considered in determining whether the privilge applies." R. Smolla, *Law of Defamation* § 8.08[2][b] (1990).

[7] In *Chevrefils*, the plaintiff, who had been employed by the state as a social worker, sued a state welfare official under Section 1983 for listing him as a "sex abuser" in a central state registry, without notice or hearing, thereby barring him from employment as a social worker in any child care agency subject to state licensing. The New Hampshire Supreme Court held that the trial court had correctly rejected the state official's immunity defense:

> "At the time of the defendant's acts, two sources of federal authority had been synthesized and explained with sufficient clarity to provide notice that an individual had a liberty interest cognizable under the fourteenth amendment, and § 1983, in continuing to pursue an occupational calling that he has heretofore exercised, which interest the government and its agents might not extinguish by

such narrow distinctions as those drawn by the Court of Appeals to determine whether a claimed right was "clearly established" for purposes of qualified immunity is inconsistent with *Anderson* and—by threatening to make qualified immunity "virtually plenary" —unreasonably restricts the availability of the *Bivens* remedy.

Had Gilley been aware of *Doe* and *Bartel*, as he is presumed to have been, he could not have failed to appreciate the unlawfulness of his conduct. The notice function intended by *Harlow* was served here.

II. SIEGERT'S CIRCUMSTANTIAL PROOF OF GILLEY'S BAD FAITH WAS SUFFICIENT TO AVOID DISMISSAL OF HIS CLAIM PRIOR TO DISCOVERY.

A. Unconstitutional Motivation May Be Established by Circumstantial Evidence.

This Court has long recognized that "[c]ircumstantial evidence * * * is intrinsically no different from testimonial evidence," *Holland* v. *United States*, 348 U.S. 121, 140 (1954), and in some instances may even be "more certain, satisfying and persuasive than direct evidence." *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960).[8] On issues involving state of mind, circumstantial evidence may be indispensable because it is so unlikely that direct evidence will be available. *American Communications Ass'n* v. *Douds*,

> the imposition of a stigma or disqualification in the absence of notice and hearing prior to the government's action." 552 A.2d at 94.

[8] *See TSC Industries, Inc.* v. *Northwestern, Inc.*, 426 U.S. 438, 463 n.24 (1976); *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 508 n.17 (1957); *The Robert Edwards*, 19 U.S. (6 Wheat.) 187, 190 (1821).

339 U.S. 382, 411 (1950). *See* Wright, *Federal Practice and Procedure—Criminal 2d* § 411, p. 481 (1982). Recognizing that reality, this Court has held specifically that constitutionally impermissible motivation may be established by circumstantial evidence. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).[9]

Siegert presented far more than "bare allegations of malice." *Harlow*, 457 U.S. at 817. To the contrary, Siegert presented impressive circumstantial evidence that Gilley's motives were malicious and, by extension, unconstitutional. According to his complaint and affidavit, Siegert had received nothing but exemplary job performance ratings between 1979 and 1984, before Gilley became his supervisor. Yet Gilley provided an extremely negative evaluation of Siegert to Col. Smith in his letter of October 23, 1985, which Siegert claimed was filled with false and unsubstantiated allegations about him; and Gilley did so against a background of sharp personal and professional differences between the two men. From these facts, Gilley's malice and unconstitutional motivation could be inferred.

[9] *See also Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S. Ct. 2678, 2686 (1989) (public figure libel plaintiff alleging that defendant acted with "actual malice" is "entitled to prove the defendant's state of mind through circumstantial evidence"); *Herbert* v. *Lando*, 441 U.S. 153, 160 (1979) (proof of state of mind in libel case may be "in the form of objective circumstances from which the ultimate fact could be inferred"). If a government official suing a private party for libel is allowed to rely on circumstantial evidence to prove the defendant's state of mind, a private party suing a government official in a *Bivens* action should be allowed to rely on such evidence as well.

The Court of Appeals erred in holding that such circumstantial evidence will not support a finding of unconstitutional motivation in a *Bivens* action. Nothing in *Harlow* or its progeny supports that result and this Court should not now establish such an arbitrary and unfair rule. If a government employee has a due process right to a good faith evaluation by his supervisor, as Siegert claims, his ability to vindicate that right through a *Bivens* action should not be made to depend on the form of his evidence. A rule forbidding the use of circumstantial evidence to establish unconstitutional motivation would place serious violations of constitutional rights effectively beyond redress.[10]

[10] In opposing certiorari, Gilley suggested that the extreme approach followed by the Court of Appeals has been embraced by other Courts of Appeals. Opp. 5. However, none of the cases he cited holds that a *Bivens* plaintiff alleging impermissible motivation may not rely on circumstantial evidence, or that a *Bivens* plaintiff relying on such evidence to establish impermissible motivation is not to be allowed discovery prior to summary judgment.

Indeed, the very first opinion cited by Gilley stresses that a *Bivens* plaintiff *should* be able to rely on circumstantial evidence of the defendant's state of mind in resisting summary judgment. *Collinson* v. *Gott*, 895 F.2d 994, 1003 (4th Cir. 1990) (Phillips, J., concurring in the judgment). In that case, moreover, "fairly extensive discovery" was allowed. *Id.* at 997 (per curiam). The other cases cited by Gilley likewise stress that *Bivens* plaintiffs must allege "specific evidence" of improper motive but they do *not* hold that that such evidence cannot be circumstantial. *See, e.g., Pueblo Neighborhood Health Centers* v. *Losavio*, 847 F.2d 642, 649 (10th Cir. 1988) (discovery allowed prior to summary judgment).

See also, e.g., Melton v. *City of Oklahoma City*, 879 F.2d 706, 716-17 (10th Cir. 1989) (jury could have determined from *Bivens* plaintiff's circumstantial evidence that he had been disciplined for engaging in protected First Amendment activities); *Springer* v. *Seaman*, 821 F.2d 871, 879 (1st Cir.

Indeed, a *Bivens* plaintiff should be permittted to rely on circumstantial evidence to establish unconstitutional motivation even if limited discovery is provided. Although Judge Wald referred to "proof of the defendant's motive" as being "peculiarly in the defendant's hands" (Pet. App. 20a), it is by no means inevitable that any direct proof of unconstitutional motivation will be in the defendant's possession. Unless the defendant admits to having acted with malice ("I did it to ruin him; I didn't care that what I said was false"), any evidence of malice necessarily will be circumstantial. If such evidence is "certain, satisfying and persuasive," *Michalic*, 364 U.S. at 330, then it should be accepted, notwithstanding that it is circumstantial.[11]

B. Limited Discovery Was Justified To Test the Strength of Siegert's Claim.

Given the circumstantial evidence that Siegert presented, the District Court would have been justified in denying Gilley's summary judgment motion based on qualified immunity. The court, however, evi-

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1987) (*Bivens* plaintiff may rely on circumstantial evidence to meet his burden of demonstrating that defendant's conduct was racially motivated); *Bell* v. *City of Milwaukee*, 746 F.2d 1205, 1255-56 (7th Cir. 1984) (*Bivens* plaintiff may rely on circumstantial evidence to prove conspiracy by defendants).

[11] The Court of Appeals, for its part, apparently would allow claims of unconstitutional motivation only in the most freakish cases, where (a) the defendant in fact has admitted his improper purpose and (b) the plaintiff has become aware of the defendant's admission without the benefit of discovery. *See* Pet. App. 17a-18a (citing *Hobson* v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985)). The memorandum containing the critical admission in *Hobson* came to light only as a result of a full-scale Congressional investigation.

dently wanted to test the strength of Siegert's circumstantial case by ordering limited discovery before requiring Gilley to face trial. *See* Pet. App. 31a, 33a, 52a. Its action in this regard surely was permissible; it is supremely ironic that Gilley complains of discovery ordered by the court for his own benefit. The one action the District Court could *not* have taken—and the one action the Court of Appeals has now ordered—was to grant Gilley's motion to dismiss in the teeth of Siegert's "very serious" and "well pleaded" allegations (Pet. App. 50a, 52a), without conducting limited discovery.

Amici are mindful of this Court's teaching that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." 457 U.S. at 817-18. The Court has instructed that "even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be particularly disruptive of effective government.'" *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow*, 457 U.S. at 817). The policy of *Harlow* is to resolve "insubstantial claims" against government officials prior to discovery and on summary judgment if possible, *Anderson*, 483 U.S. at 640 n.2, and to preclude trial or discovery "in cases where the legal norms the offiicals are alleged to have violated were not clearly established at the time." *Mitchell*, 472 U.S. at 526 (citing *Harlow*, 457 U.S. at 817-18).

Conversely, however, if the plaintiff's allegations state a violation of clearly established law, a defendant pleading qualified imunity is not entitled to dismissal before the commencement of discovery. *See Mitchell*, 472 U.S. at 526 (citing *Harlow*, 457 U.S. at 817-18). In such a case, this Court has allowed

discovery prior to summary judgment to resolve the question of whether the defendant indeed acted as alleged. *Anderson*, 483 U.S. at 646 n.6.[12]

In ordering limited discovery prior to ruling on Gilley's motion for dismissal or summary judgment, the District Court was faithful to these principles. The court satisfied itself that Siegert's asserted right to a good faith evaluation from his supervisor was clearly established at the time of Gilley's conduct. Pet. App. 39a. The court also satisfied itself that Siegert's claims, far from being 'insubstantial," were "well pleaded" (Pet. App. 52a) and "very serious" (Pet. App. 50a). The court ordered discovery solely to determine whether Siegert's own job record was what he claimed it to be and whether Gilley had acted as alleged. *See* Pet. App. 52a. This was, in short, discovery "tailored specifically to [Gilley's] qualified immunity." *Anderson*, 483 U.S. at 646-47 n.6. And, far from ordering "broad-reaching discovery," *Harlow*, 457 U.S. at 817-18, the court provided that such discovery was to be "sharply circumscribed." Pet. App. 31a.

[12] The Court stated in the pertinent part of the footnote:

"[Q]ualified immunity questions should be resolved at the earliest possible stage of a litigation. Thus, on remand it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to discovery. If they are not, and if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved. Of course, any such discovery should be tailored specifically to the question of Anderson's qualified immunity." (Citations omitted.)

Gilley contends that *Anderson* is distinguishable because in that case the plaintiff and defendant had presented differing versions of the defendant's conduct, while here "there is no dispute for present purposes that [Gilley] composed and sent the letter; the only disputed question is whether he did so with impermissible intent." Opp. at 8 n.3. But whether Gilley acted with impermissible intent (that is, whether or not he acted as Siegert has alleged) is precisely the kind of question on which discovery was permitted in *Anderson*. The fact that the inquiry here goes to Gilley's state of mind is a consequence of the particular due process right that Siegert claims has been violated.

Gilley further argues: "Nothing in *Anderson* suggests that [Siegert] may pursue discovery simply in the hope of garnering support for his otherwise unsupported belief that the letter was sent in bad faith." Opp. at 8 n.3. But, to repeat, it was not Siegert who requested discovery; the District Court ordered discovery on its own motion. Moreover, Siegert's claim that Gilley acted in bad faith is supported by strong circumstantial evidence; he does not depend on discovery to adduce proof otherwise lacking. The reality is that the District Court ordered limited discovery to give Gilley an opportunity to overcome Siegert's strong circumstantial case. Instead of availing himself of that opportunity, however, Gilley took the position that circumstantial evidence cannot support a finding of unconstitutional motivation in a *Bivens* action.

Finally, Gilley contends that Siegert's position allows a *Bivens* plaintiff "to proceed to discovery and

trial based on conclusory allegations regarding the subjective state of mind," thereby circumventing *Harlow* and negating the basic purposes of qualified immunity. Opp. at 8 n.3. This contention, too, is misconceived. As discussed, Siegert's allegations were not conclusory but were supported by strong circumstantial evidence. And Siegert was entitled to discovery not because he had alleged, superfluously, that Gilley had acted in bad faith, but because Gilley's state of mind was an essential element of the claimed constitutional violation. Siegert's ability to proceed to trial depends on whether his claim that Gilley had acted in bad faith survives the discovery ordered by the District Court.

Gilley's real quarrel seems to be with the proposition that a defendant's intent (unrelated to knowledge of the law) may ever be an essential element of a plaintiff's claim in a *Bivens* action. Unable to argue that such claims should be barred in *Bivens* actions outright, Gilley attempts to block such claims by proposing procedural roadblocks that few plaintiffs could ever surmount—an arbitrary rule against circumstantial evidence to prove impermissible motivation, and a rule flatly precluding discovery when direct evidence of impermissible motivation has not been alleged. These devices undoubtedly would spare government officials from lawsuits; but in many cases they also would close off " 'the only realistic avenue for vindication of constitutional guarantees.' " *Anderson*, 483 U.S. at 638 (quoting *Harlow*, 457 U.S. at 814).

CONCLUSION

The judgment below should be reversed and the limited discovery ordered by the District Court should be allowed to proceed.

Respectfully submitted.

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